95-1084

No. _____

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1995

STATE OF ALASKA,

*Petitioner,*

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, KATIE JOHN, et al.,

*Respondents.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether, as decided by the Ninth Circuit, the term "public lands" in the Alaska National Interest Lands Conservation Act includes navigable waters in which the federal government possesses reserved water rights, so that the traditional state management of important fisheries in such waters may be preempted by federal officials, a determination directly contradicted by a decision of the Alaska Supreme Court?

## LIST OF PARTIES BEFORE THE NINTH CIRCUIT

The parties to the proceedings below were the petitioners State of Alaska and Commissioner of the Alaska Department of Fish and Game Frank Rue, and respondents Secretary of the Interior Bruce Babbitt, Secretary of Agriculture Dan Glickman, Katie John, Doris Charles, the Mentasta Village Council, and the Alaska Federation of Natives.

Participating as amici curiae were the States of Arizona, California, Idaho, Montana, Nevada, and Oregon, Peninsula Marketing Association, Concerned Area M Fishermen, Aleutians East Borough, Shumagin Corporation, Qagan Tayagungin Tribal Council, Agdaagux Tribal Council, Nelson Lagoon Village Council, False Pass Tribal Council, the Native Village of Quinhagak, the Native Village of Goodnews Bay, the Association of Village Council Presidents, the Sitka Tribe of Alaska, the Alaska Inter-Tribal Council, RurAL CAP, Louie Smith, Annie Cleveland, the Native Village of Elim, Nome Eskimo Community, Kawerak, Inc., Manilaq Association, Lincoln Peratrovich, Shakan Kwaan, a Tlingit band, J.K. Samuel, and Taanta Kwaan, a Tlingit band.

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## JURISDICTION

The Court of Appeals for the Ninth Circuit filed its decision in this case on April 20, 1995. The court denied the State of Alaska's petition for rehearing and rejected its suggestion for rehearing en banc on August 8, 1995. App. 55. A petition for a writ of certiorari was due on or before November 6, 1995, and Justice O'Connor extended this deadline to December 6, 1995. App. 56. The Ninth Circuit withdrew its opinion and filed a new opinion on December 19, 1995. This Court has jurisdiction to review on a writ of certiorari the Ninth Circuit's judgment under 28 U.S.C. § 1254.

## RELEVANT STATUTES

**16 USC § 3102:**

**Definitions.** As used in this Act (except that in title IX and XIV the following terms shall have the same meaning as they have in the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1601 et seq.], and the Alaska Statehood Act)

(1) The term "land" means lands, waters, and interests therein.

(2) The term "Federal land" means lands the title to which is in the United States after December 2, 1980.

(3) The term "public lands" means land situated in Alaska which, after December 2, 1980, are Federal lands, except –

(A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;

(B) land selections of a Native Corporation made under the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1601 et seq.] which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and

(C) lands referred to in section 19(b) of the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1618(b)].

**16 U.S.C. § 3114:**

**Preference for subsistence uses.** Except as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes. Whenever it is necessary to restrict the taking of populations of fish and wildlife on such lands for subsistence uses in

order to protect the continued viability of such populations, or to continue such uses, such priority shall be implemented through the appropriate limitations based on the application of the following criteria:

(1) customary and direct dependence upon the populations as the mainstay of livelihood;

(2) local residency; and

(3) the availability of alternative resources.

## STATEMENT OF THE CASE

This case presents the issue of geographic scope of the Alaska National Interest Lands Conservation Act ("ANILCA"), P.L. 96-487 (1980), specifically whether Congress intended ANILCA's application to "public lands" to include navigable waterways in Alaska that are subject to implied federal reserved water rights. No current issue involving Alaska and its resources is of greater significance to the State of Alaska ("the State"), because it determines the extent to which federal agencies will take over management of Alaska's fisheries, and to a lesser degree, its wildlife.

The State assumed management of the fish and wildlife on all lands in Alaska in 1960. Management control of Alaska's fisheries was one of the primary reasons Alaskans sought statehood in the 1950's, as Alaska's salmon stocks were decimated under the management of federal authorities. *See Metlakatla Indian Community v. Egan*, 362 P.2d 901 (Alaska 1961), *rev'd in part*, 369 U.S. 45 (1962).

In 1980, Congress passed ANILCA, a land conservation statute that includes a title granting a priority for hunting and fishing to rural residents, applicable to "public lands." 16 U.S.C. §§ 3111-3126. State law granted the same priority, and the State continued to manage fishing and hunting on all lands in Alaska until 1990. The Secretaries of Interior and Agriculture ("the Secretary") reassumed fish and wildlife management on public lands, however, in response to the Alaska Supreme Court decision in *McDowell v. State*, 785 P.2d 1 (Alaska 1989). In *McDowell*, the court found that Alaska's law giving rural residents a subsistence priority violated the state constitutional guarantees of equal access and prohibition of exclusive rights to fish and game. Alaska law now gives a priority to all subsistence users regardless of their residence. AS 16.05.258 (1992).

In response to *McDowell*, the Secretary determined that because the State constitutionally cannot limit a priority for subsistence hunting and fishing to rural residents, the United States must take over fish and wildlife management to administer the priority. The Secretary promulgated regulations for subsistence hunting and fishing on "public lands" in Alaska, creating the Federal Subsistence Board and giving it authority to adopt regulations for the day-to-day management of subsistence hunting and fishing. 57 Fed. Reg. 22,940 (May 29, 1992); 36 C.F.R. 242 (1995), 50 C.F.R. 100 (1994). The regulations define the "public lands" to which they apply as federally-owned lands and those waters running over federally-owned submerged lands. 36 C.F.R. 242.3(b), 50 C.F.R. 100.3(b).

**Proceedings Below.**

In 1990 Katie John, Doris Charles, and the Mentasta Village Council filed suit against the United States in the United States District Court for the District of Alaska, challenging the regulations as too restrictive and seeking application of the priority and federal management to all navigable waters.[1] *John v. United States*, D.Ct. No. 90-484-CV. They alleged that contrary to the Secretary's interpretation, Congress intended the subsistence priority granted by 16 U.S.C. § 3114, applicable to "public lands," to attach to all navigable waters in Alaska. They later named the State as a defendant, the Alaska Federation of Natives intervened, and all parties moved for partial summary judgment.

Counsel for the United States defended the regulations in briefing and at oral argument, arguing repeatedly that "public lands" as defined by ANILCA include only those lands and waters that the United States wholly or partially owns, and that the United States does not hold title to any interest in navigable waters. After three years of consistently advocating this interpretation, however, the United States suddenly changed its position. At a second oral argument on the same cross-motions for summary judgment, counsel for the United States announced that the Secretary now agrees that "public lands" include waters subject to a federal reserved water right. A federal reserved water right arises when the United States withdraws its lands from the public domain and reserves it

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[1] The district court had jurisdiction pursuant to 16 U.S.C. 3117 and 28 U.S.C. 1331, 1346.

for a federal purpose, and by implication reserves appurtenant waters then unappropriated. *Cappaert v. United States*, 426 U.S. 128, 138 (1976).

In March 1994 the district court ruled that because the United States holds title to the navigational servitude, all navigable waters in Alaska constitute "public lands" subject to federal fisheries management. *Katie John v. United States*, Nos. A90-0484-CV, A92-0264-CV (consolidated) (HRH), 1994 WL 487830 (D. Alaska 1994). The court stayed its decision pending appeal. The State and the United States filed petitions for review, which the Ninth Circuit granted pursuant to 28 U.S.C. § 1292(b) on May 17, 1994. C.A. Nos. 94-80141, 94-80142. Both the State and the United States appealed the district court's decision that the navigational servitude renders navigable waters "public lands." C.A. Nos. 94-35480, 94-35481.

The Ninth Circuit reversed the district court, finding that the United States does not hold title to the navigational servitude, but that "public lands" include all navigable waters in which the United States implicitly has reserved a water right. App. 1. The Court did not discuss how it reached this result based on the statute's definition of "public lands," which is "lands, waters, and interests therein, title to which is in the United States." App. 7 (combining the definitions in 16 U.S.C. § 3102(1)-(3)).[2] The court simply found that Congress must have meant

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[2] ANILCA defines "public lands" as follows:

As used in this Act . . .

1) The term "lands" means lands, water, and interests therein.

to include navigable waters in the definition of "public lands," and deferred to the federal agencies' recently-adopted position that Congress granted the Secretaries authority to manage fisheries where the United States has a federal reserved water right for in-stream flows.

The Ninth Circuit denied the State's petition for rehearing and rejected its suggestion for rehearing en banc on August 8, 1995. On August 9, the State submitted the Alaska Supreme Court's decision in *Totemoff v. State*, ___ P.2d ___, 1995 WL 479510 (1995) (corrected opinion at 1995 WL 619365 (Alaska 1995)) to the Ninth Circuit as supplemental authority. On August 10, 1995, the Ninth Circuit ordered the mandate withheld pending further order. On December 19, 1995, the Ninth Circuit withdrew the opinion and issued another in its place. ___ F.3d ___, 1995 WL 749795. Judge Cynthia Holcomb Hall, who initially had joined the majority opinion, changed her position and wrote a dissent. She wrote that as judges, the Ninth Circuit panel is neither qualified to nor capable of deciding whether Alaska or the United States has control over Alaska's navigable waters. She was "compelled to conclude" that the United States has no interest in Alaska's navigable waters, and that therefore these waters are not "public lands" under ANILCA. App. 23.

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2) The term "Federal lands" means lands the title to which is in the United States after December 2, 1980.

3) The term "public lands" means land situated in Alaska which, after December 2, 1980 are Federal lands [with certain exceptions]. 16 U.S.C. 3102(1)-(3) (citations omitted).

## REASONS FOR GRANTING THE WRIT

### I.

**The Ninth Circuit and the Alaska Supreme Court have directly conflicting decisions interpreting federal law that will create a jurisdictional crisis between the State and the United States if not resolved by this Court.**

The Ninth Circuit in *State v. Babbitt* and the Alaska Supreme Court in *Totemoff v. State* have issued directly conflicting opinions construing the geographic scope of "public lands" as defined in ANILCA, 16 U.S.C. § 3102. *Babbitt* holds that public lands include navigable waters subject to a federal reserved water right; *Totemoff* holds that they do not. This difference in interpretation creates a jurisdictional conflict as to whether the United States or the State has regulatory authority over the fish in many waterways in Alaska. A federal takeover of Alaska's fisheries while state residents continue to follow and state courts continue to enforce state regulations would harm both the citizens of Alaska caught between clashing authorities and the fish stocks whose sustained yield depends upon harvest levels determined by the management authority.

In *Totemoff v. State*, ___ P.2d ___, 1995 WL 619365 (Alaska 1995), the Alaska Supreme Court decided the same issue faced by the Ninth Circuit in this case. App. 25. In *Totemoff*, the State prosecuted a rural resident for shooting a deer with the aid of a spotlight, and the defendant raised as a defense the claim that spotlighting deer is a protected activity under ANILCA's subsistence priority. 1995 WL 619365 at *1. The defendant was in his boat on navigable waters when he shot the deer, so his

defense required the Alaska Supreme Court to determine whether those waters constitute "public lands" under ANILCA. The court found that "public lands" do not include navigable waters by virtue of the federal reserved water right, contrary to the Ninth Circuit decision in this case. *Id.* at *8.

The geographic scope of "public lands" is significant for two reasons: (1) ANILCA's subsistence priority for rural residents applies only to hunting and fishing on public lands, 16 U.S.C. § 3114, and (2) the federal agencies have deemed it necessary to assume management authority over fish and wildlife on public lands because the State cannot grant a preference for hunting and fishing based solely on residency under Alaska's constitution. Therefore, on public lands rural residents have federal rights that do not exist on state and private lands, and the Secretary will issue regulations to supersede the State's management authority.

This conflict over the geographic scope of ANILCA puts the State in an untenable position. Unless this Court resolves the geographical conflict, state officials will be bound to follow two irreconcilable decisions, each interpreting the geographic scope of "public lands" differently. How can the State comply with both decisions? *Totemoff* holds that state regulations apply to navigable waters as a matter of federal law, and therefore that the State is responsible for managing the fisheries, promulgating regulations applicable to all residents determining permissible harvest levels, seasons, and methods, and enforcing its laws in its navigable waters. At the same time, the State is bound by the *Babbitt* decision that holds that the United States must assume management

authority and promulgate regulations governing harvest levels, seasons, and methods in many waterways. These are irreconcilable decisions. The State either must manage the fisheries for subsistence uses or defer to federal management; it cannot do both.[3]

Two managers with independently endorsed regulatory control of fisheries would be harmful to the public. Alaskans would be required to follow two sets of regulations purporting to govern hunting and fishing on navigable waters, and state and federal courts would be bound to follow the respective decisions interpreting the scope of "public lands" under ANILCA. Depending on the differences between the state and federal regulations, Alaskans could face the dilemma of being subject to prosecution by one authority for following the laws of the other. Although the Supremacy Clause dictates generally that federal law preempts directly conflicting state law, it is inapplicable here because *Totemoff* is based on the Alaska Supreme Court's interpretation of federal law. *See, e.g., Lockhart v. Fretwell*, 113 S.Ct. 838, 846 (1993) (Thomas, J., concurring) ("The Supremacy Clause demands that

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[3] Deferring to federal management means that the State waits while regional councils propose to the Federal Subsistence Board the desired bag limits, seasons, and methods for subsistence fishing for each waterway within its jurisdiction, and while the Federal Subsistence Board determines whether and how to implement the proposals and promulgates regulations. The State then must estimate the number of fish that will be harvested under the federal subsistence regulations, determine how many fish might be left for commercial, sport, and urban subsistence users, then allocate the remainder among these users by setting their bag limits, seasons, and methods.

state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation. In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located.") Thus, if a rural resident violates a state fishing regulation and raises as a defense that ANILCA's priority entitles him or her to engage in that activity, an Alaska court presumably would apply *Totemoff* and find the priority inapplicable to navigable waters.[4]

Perhaps even more devastating would be the effect on the fish of two regulatory entities that each believes it has responsibility to manage for subsistence uses in the affected waters. For the State, fisheries management involves complex analyses based on numerous factors, with the goal of permitting a harvest level that will provide a priority to subsistence fishers and a fair and reasonable opportunity to other users, and that will assure sustained yield of the stocks. *See* AS 16.05.258(b)(1), 16.05.251(d). To accomplish this, the State monitors such factors as population abundance, numbers of spawners, disease, food supply, habitat, extreme weather conditions, predators, and birth and death rates. *See generally* AS 16.05.251. The State must evaluate the

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[4] Such conflicts exist already in hunting regulations. For example, state regulations prohibit hunting from boats in game unit 4, but federal subsistence regulations permit shooting deer from boats in game unit 4. *Compare* 5 AAC 92.085(9) *with* 36 C.F.R. 242.25(k)(4)(iii) *and* 50 C.F.R. 100.25(k)(4)(iii).

health and stability of the population, determine causes of population unhealthiness or decline, collect harvest reports from the previous season or fishing period, then consider these factors in deciding how much of the population can be harvested, when it can be taken, and what type of fish can be harvested (*e.g.*, species, sex, condition, size). Sometimes these decisions must be made quite quickly.

For example, the State manages the Prince William Sound herring sac roe fishery entirely by Emergency Order. *See* 5 AAC 27.310. The health of the stock depends on accurate information and immediate decisions. The State collects stock abundance estimates and information on fish roe quality daily, and compiles catch statistics within two to six hours following a commercial fishery opening. Advance notice prior to commercial fishing openings can be as little as one hour and individual fishery openings may be as short as 15 minutes. The entire fishery may be over following a single such opening, depending on the population and harvest data the State collects. During 1995, the State determined before the season that the stock was not healthy enough to support a commercial harvest and decided not to open the fishery at all. App. 64.

Two separate managers making these determinations are likely to make conflicting harvest determinations based on separate harvest records, separate habitat-maintenance decisions, different means and methods of fishing and season lengths and times, and different predictions or analyses of population fluctuations. Effective management of fish and wildlife with two regulators that understand and accept the boundaries of their

respective authority is difficult; effective management of fish and wildlife with two regulators each asserting exclusive jurisdiction over the same waters for a particular use is simply impossible.

The potential geographical extent of this jurisdictional conflict should not be underestimated. Although the Ninth Circuit decision purports to require the Secretary to include only navigable waters in which the United States holds an implicit reserved water right, in fact usurpation of the State's management authority could be almost complete. Rural residents in this case and other litigation have contended that the Secretary must regulate fish and wildlife *off* public lands in order to afford the subsistence priority *on* public lands. *See* First Amended Complaint for Declaratory and Injunctive Relief at 15, App. 58. They reason that for migratory animals and anadromous fish (such as salmon), harvests occurring miles off public lands will affect harvest opportunities on public lands. This would deprive the State of primary management of Alaska's salmon fisheries in most inland waterways and in the ocean.

## II.

**The Ninth Circuit decision deprives Alaska of management authority over its fisheries without a clear indication that Congress considered or intended this result.**

The Ninth Circuit's decision in this case will deprive the State of control of its fisheries in many or most of its waters, a result that Congress clearly did not intend in enacting 16 U.S.C. § 3102. This consequence is of critical importance to the State because acquiring management of

Alaska's fisheries was a primary reason Alaskans sought statehood and remains fundamental to Alaska's identity as a state. Before statehood, Alaska's salmon stocks were decimated under the management of federal authorities. *See Metlakatla Indian Community*, 362 P.2d 901. In 1950 Alaska's Territorial Governor Ernest Gruening testified to the Senate Committee on Interior and Insular Affairs that Alaskans considered statehood to be inextricably tied to control of the territory's fisheries. *Hearings on H.R. 331 and S.2036 Before the Senate Comm. on Interior and Insular Affairs*, 81st Cong., 2d Sess. 486 (April 24-29, 1950).

> We all feel in Alaska that it is inconceivable to think of a State being created without control of [fisheries]. Alaskans feel that the very existence and perpetuation of that resource, which has so often been jeopardized in the past in no small degree because of inadequate enforcement due to insufficient Federal appropriations, depends on local control. The people of Alaska all feel, and this is said without any criticism, that they could do a better job with the conservation of fisheries than has been done through the years.

*Id.*

Under State management, salmon stocks in Alaska have rebuilt to record levels. *See* Ron Regnart, Comparative History of Federal and State Management of Fisheries in Alaska at 36-37 (June 1993), Exhibit to Docket 141, *Katie John, et al. v. United States of America, et al.*, No. A90-484-Civ (HRH), App. 62. The seafood industry is Alaska's largest private sector employer, and is second only to oil and gas in natural resource revenue contribution to the State treasury. *Id.* Alaska's commercial fishery supports the highest level of production in the United

States, about one-half of the nation's total. *Id.* State management of Alaska's fisheries is a defining element of state sovereignty to Alaskans. Alaska should not have to succumb to federal control of one of its most valuable natural resources unless Congress unmistakably expresses this intention.[5]

The Ninth Circuit's strained attempt to judicially include navigable waters in 16 U.S.C. § 3102 disregards the clear statement doctrine, under which a court should not divest a state of traditional powers unless Congress has made that intent manifestly apparent. The Supreme Court will interpret a law to affect all activities within Congress' control under its commerce power only if the statutory language or legislative history constitutes a clear statement that Congress intended to exercise this power in full. Laurence H. Tribe, *American Constitutional Law*, § 5-8 at 316 (2d ed. 1988). As Justice Frankfurter stated, federal statutes impinging upon important state

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[5] ANILCA's legislative history indicates that Congress never considered the possibility that minor interests of the United States in lands or waters might render them "public lands" subject to the subsistence priority. Alaska state law already granted a priority for all lands in Alaska when ANILCA was enacted, so Congress did not concern itself with the implications of its definition of "public lands" but merely defined them as "lands" owned by the United States, *i.e.* "lands, waters, and interests therein," which is boilerplate language it uses routinely in statutes in title 16 establishing conservation areas and parks. *See, e.g.*, 16 U.S.C. §§ 90b, 110c(c)(3), 121, 228b(a), 230a(b), 230g(a), 272(a), 273, 398d, 410j, 410o, 410p, 410bb(b)(1), 410ff-1(a), 410gg, 410gg-1, 410ii-3(a), 410jj-3(c), 410mm-2(b), 410qq-2(a), 410rr-2, 410rr-7(c).

interests "cannot . . . be construed without regard to the implications of our dual system of government. . . . "

> [W]hen the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.

Felix Frankfurter, *Some Reflections of the Reading of Statutes*, 47 Colum. L. Rev. 527, 540 (1947), quoted in part in *BFP v. Resolution Trust Corporation*, 114 S. Ct. 1757, 1764 (1994).

The Ninth Circuit's interpretation of public lands constitutes a contrived, enigmatic reading of Congress' attempt to set definite geographical boundaries. Congress did not state a clear intent to include navigable waters in defining "public lands" as "lands, waters, and interests therein, title to which is in the United States." 16 U.S.C. § 3102(1)-(3). To reach the conclusion that waters subject to a federal reserved water right constitute "public lands," the Ninth Circuit disregarded the actual language of the provision and ruled as though Congress had defined "public lands" as "lands and waters in which the United States has any interest." Thus, it found that the existence of a federal reserved water right to prevent excessive appropriation in the streamflow of a river would convert the entire river flowing through the federal reservation into "public lands." When a court precedes its statutory interpretation with significant

substantive redrafting, the interpretation by definition does not reflect a clear statement of Congressional intent.

The decision renders meaningless language that Congress intended to limit the legislation's effect. Congress intended the definition of "public lands" to designate a limited, definite geographic area to which federal regulation would apply. If "public lands" are lands and waters in which the United States has any interest, the geographic area is impossible to determine without comprehensive analyses of all interests in every parcel of land and waterway and legal determinations of what level of federal interest converts lands and waters to "public lands." This Court rejected a similarly expansive interpretation of a provision in the Employee Retirement Income Security Act that marks for preemption "all state laws insofar as they relate to any employee benefit plan," because it rendered words of limitation completely without limitation. *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S.Ct. 1671, 1676-77 (1995) (citations omitted). Similarly, interpreting "public lands" to include all lands and waters in which the United States has any interest effectively assures that "preemption [will] never run its course." *Id.* If a right to prevent over-appropriation of water renders a navigable river "public lands," then no principled reason can exclude from this characterization lands or waters subject to federal easements,[6] Internal Revenue Service liens, and

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[6] Under 43 U.S.C. 945, all patents for federal land after 1890 west of the 100th meridian are conveyed subject to a reserved federal right-of-way for construction of ditches and canals; this includes nearly all state and private lands in Alaska.

state-permitted water rights. Indeed, the state must deny non-reserved water right permits to the United States if it finds their issuance not to be in the public interest, AS 46.15.080(a)(4), and losing state management of the fisheries in a river may be considered contrary to the interests of Alaskans.

The court's interpretation of "public lands" is anomalous not only because it includes waters far beyond the federal lands Congress intended, but also because its principled application *excludes* vast federal lands and all navigable waters. If all lands and waters in which the United States has any interest are "public lands," then all lands or waters in which the state has any interest granted or confirmed by federal law are excepted. *See* 16 U.S.C. § 3102(3)(A) (exception to the definition of public lands for "[lands, waters, and interests therein] confirmed . . . or granted to the Territory of Alaska or the State under . . . Federal law"). For example, as the Alaska Supreme Court noted in *Totemoff*, Congress granted the State the natural resources in Alaska's navigable waters, and therefore all navigable waters ought to be excluded from ANILCA's definition of "public lands." 1995 WL 619365 at *9; *see* Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315 (1953). Thus, although under *Babbitt* a water right renders certain navigable waters "public lands," under the same principle the state's federally-confirmed interest as public trustee of the resources in navigable waters excepts them from that definition. Similarly, federal lands in which the state has an interest are excepted from "public lands." This includes federal lands over which the state has access rights to inholdings. *See, e.g.*, 16 U.S.C. § 3170; 16 U.S.C. § 3210.

The extreme awkwardness of using a reserved water right to define a geographic area also indicates the Ninth Circuit's indifference to the clear statement requirement, because Congress would not choose a definition for "public lands" so difficult to apply. The Secretary's ability to exert control over lands or waters in which the United States holds an interest requires that the interest be of a nature that adheres to a definite area. The United States' interest in a reserved water right in this case constitutes the right to prevent others from appropriating more water than necessary to sustain sufficient in-stream flows for fish habitat. Only this right constitutes "public lands" under 16 U.S.C. § 3102,[7] and these "public lands" are intangible and non-possessory. Designating this right as "public lands" does not give the Secretary fish and wildlife management authority in any definite area, and thus such a designation is meaningless.

Even if the waters subject to the right rather than the right itself constituted "public lands," the waters subject to the right cannot define a geographical area. To divide the waters in any given water column between "public lands," the minimal amount of the water reserved for fish passage, and the remaining waters is impossible. The federal reserved water right applies only where Congress implicitly reserved water and only to the extent necessary to fulfill the primary purpose of the reservation. *See Cappaert*, 426 U.S. at 141. Further, quantification of the

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[7] Under the plain language of 16 U.S.C. § 3102, a federal interest in lands or waters might constitute "public lands," but the existence of the interest does not convert vast areas of land and waters into "public lands."

minimum amount of water to preserve in-stream flows for fish is a complex undertaking requiring water and fisheries specialists.

Despite the tremendous strain required to find that 16 U.S.C. § 3102 includes waters subject to a federal reserved water right, the Ninth Circuit found that "ANILCA's language and legislative history indicate clearly that Congress spoke to the precise issue of whether some navigable waters may be public lands." App. 8. The court's explanation for this assertion further demonstrates its disregard for the clear statement necessary to find that Congress carefully considered and fully intended to assume fisheries management of Alaska's navigable waters. The court reasoned that ANILCA's language and legislative history indicate that subsistence uses include subsistence fishing, and subsistence fishing traditionally has occurred in navigable waters; therefore Congress must have intended that "public lands" include some navigable waters. App. 8.

This does not demonstrate that Congress spoke to the precise issue. The court's conclusion is invalid as a matter of statutory interpretation because the subsistence priority applies to "public lands," not to traditional subsistence fishing. Inclusion of navigable waters within the "public lands" definition certainly can be rationalized as providing for subsistence fishing, but Congress plainly intended the priority to extend to "public lands," not to "areas providing for subsistence hunting and fishing." Further, subsistence fishing traditionally has occurred in non-navigable waters as well, and so a definition limited to waters in which the United States owns the submerged

lands would effectuate the priority even if it does not apply to most navigable waters.[8] The rationale that Congress intended to include all areas traditionally used for subsistence hunting and fishing mandates inclusion of many state and private lands as "public lands," clearly not what Congress intended.

The Ninth Circuit decision violates the clear statement doctrine also because it defers to an agency interpretation developed during litigation that is directly contrary to its earlier position. Finding ANILCA's text and legislative history "unhelpful" in divining which navigable waters are public lands, the court deferred to the United States' interpretation of the term with little analysis. App. 8-9. Deference was unwarranted in this case because the United States adopted its interpretation during the litigation, after three years of vehemently asserting the contrary position. The United States itself did not suggest that its position was entitled to deference in this case. When a court simply accepts an interpretation of the extent of federal usurpation of the state's traditional police power that the United States expressly and actively repudiated for three years, it has not found that Congress has made a clear statement of the extent of the preemption.

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[8] The federal regulations for subsistence fishing apply in a significant number of navigable waters as well, where the United States claims title to the submerged lands. *See* 36 C.F.R. 242.3(b) (1992), 50 C.F.R. 100.3(b) (1992). The United States claims title to most of the land withdrawn before statehood, which includes 25% of Alaska.

## CONCLUSION

The conflict in decisions between the Ninth Circuit and the Alaska Supreme Court will cause jurisdictional chaos in fisheries management in Alaska. Further, the Ninth Circuit decision legislates a federal takeover of fisheries on a scale and in a manner that Congress never considered. For these reasons, this Court should grant this petition for certiorari.

DATED this 29th day of December, 1995.

Respectfully submitted,

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**APPENDIX**

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | |
|---|---|
| STATE OF ALASKA,<br>*Plaintiff-Appellant,*<br>v.<br>BRUCE BABBITT, Secretary of the Interior, et al.,<br>*Defendants-Appellees.* | No. 94-35480<br>D.C. No.<br>CV-92-0264-HRH |
| KATIE JOHN, et al.,<br>*Plaintiffs-Appellees.*<br>v.<br>UNITED STATES OF AMERICA, et al.,<br>*Defendants-Appellants.* | No. 94-35481<br>D.C. No.<br>CV-90-0484-HRH<br>ORDER AND OPINION |

Appeals from the United States District Court
for the District of Alaska
H. Russel Holland, District Judge, Presiding

Argued and Submitted
February 8, 1995 – Seattle, Washington

Opinion Filed April 20, 1995

Opinion Withdrawn December 19, 1995

Filed December 19, 1995

Before: Eugene A. Wright, Cynthia Holcomb Hall and Charles Wiggins, Circuit Judges.

Opinion by Judge Wright; Dissent by Judge Hall

These appeals arise from the efforts of Katie John, Doris Charles and the other upper Ahtna Athabaskan Indians of Mentasta Village to continue subsistence fishing at Batzulnetas as they and their ancestors have done since time immemorial.[1] The fishery at Batzulnetas lies near the confluence of Tanada Creek and the Copper River and within Wrangell-St. Elias National Park. They also involve the claim by the state of Alaska that the Secretaries of the Interior and Agriculture, on behalf of the federal government, are attempting to exercise too much control over fish and wildlife management within the state.

The Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3101 et seq., requires that subsistence fishing and hunting be given a priority over other uses of fish and wildlife on "public lands." The sole issue remaining in this appeal concerns the meaning of the definition of public lands in § 102 of ANILCA. 16 U.S.C.

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[1] The following amici curiae also seek to continue subsistence fishing in particular navigable waters: the Peratrovich Plaintiffs whose ancestors fished in marine waters in the Alexander Archipelago and within the Tongass National Forest; the Tlingit, Haida and Tsimshian Indians of the Sitka Tribe whose ancestors also fished in marine waters; the Yup'ik Eskimos of the Villages of Quinhagak and Goodnews Bay whose ancestors fished at the mouths of the Kanektok and Goodnews Rivers; and the Native Alaskans of the Village of Elim and the Nome Eskimo Community whose ancestors fished along the coast of the Seward Peninsula in northern Norton Sound.

§ 3102.[2] Specifically, the parties dispute whether navigable waters fall within the statutory definition of public lands and are thus subject to federal management to implement ANILCA's subsistence priority.[3]

The district court adopted a highly expansive definition of public lands, holding that the subsistence priority applies to all Alaskan waters subject to the federal navigational servitude. We disagree. Instead, we hold that the subsistence priority applies to navigable waters in which the United States has reserved water rights. We hold also that the federal agencies that administer the subsistence priority are responsible for identifying those waters. We therefore reverse and remand to the district court for further proceedings consistent with this opinion.

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[2] Another issue originally raised in this appeal was whether Title VIII of ANILCA authorizes the federal government to manage subsistence fishing and hunting on public lands in the absence of Alaska laws implementing the subsistence priority. The district court held that ANILCA does, in fact, authorize the appropriate federal agencies to promulgate regulations if the state does not or cannot do so. After briefing was completed in this court, but before oral argument, the parties, including the state of Alaska, stipulated to the dismissal with prejudice of that issue. We accepted the stipulation.

The Alaska Legislature, angry with the Governor's directive to the Attorney General to stipulate to the dismissal, filed an emergency motion for intervention and, in the alternative, for substitution, or for stay. We denied its motion, concluding that the Legislature was not empowered under state law to intervene in the appeal.

In light of the dismissal with prejudice of that issue, the district court's holding on this issue stands.

[3] As the parties do not dispute whether nonnavigable waters are public lands, we do not address that issue.

## I. BACKGROUND

In 1958, Congress preserved aboriginal fishing rights in the Statehood Act. Act of July 7, 1958, Pub.L. 85-508, § 4, 72 Stat. 339. But in 1960, after assuming responsibility for fish and wildlife management, the state closed the fishery at Batzulnetas and other traditional subsistence fisheries. In 1971, Congress extinguished aboriginal fishing rights. 43 U.S.C. § 1603(b).

Congress expected that the state and the federal agencies would protect subsistence hunting and fishing. 1971 U.S.C.C.A.N. 2192, 2247, 2250. In 1980, frustrated with their failure to do so, Congress enacted ANILCA. Title VIII of ANILCA required that rural Alaska residents be accorded a priority for subsistence hunting and fishing on public lands. 16 U.S.C. §§ 3113, 3114. Pursuant to § 805(d) of ANILCA, 16 U.S.C. § 3115(d), Congress gave the state authority to implement the rural subsistence preference by enacting laws of general applicability consistent with ANILCA's operative provisions. In anticipation of ANILCA's passage, the state enacted laws consistent with Title VIII which gave rural residents a subsistence priority. In 1982, after Congress enacted ANILCA, the Secretary of the Interior certified the state to manage subsistence hunting and fishing on public lands.

Congress could not have anticipated the next chain of events. In 1989, the Alaska Supreme Court struck down the state act granting the rural subsistence preference as contrary to the Alaska state constitution. *McDowell v. Alaska*, 785 P.2d 1 (Alaska 1989). It stayed its decision to

give the legislature an opportunity to amend the constitution or otherwise bring its program into compliance with ANILCA. The legislature, however, failed to act during either its regular or special session.

In 1990, the federal government withdrew Alaska's certification and took over implementation of Title VIII. The Secretary of the Interior, on behalf of all concerned federal agencies, published temporary subsistence management regulations that adopted a very narrow definition of public lands, explaining that "navigable waters generally are not included within the definition of public lands." 55 Fed.Reg. 27,114, at 27,115 (June 29, 1990). The final regulations did not differ significantly. *See* 57 Fed.Reg. 22,940, at 22,942 (May 29, 1992).

Katie John and the state brought separate actions against the federal agencies; Katie John challenged the regulations that provided that public lands excluded navigable waters and the state challenged the federal government's authority to regulate in this area at all. The district court ordered these actions consolidated and that other actions raising similar issues be jointly managed.[4] After consulting with counsel for the parties in the jointly managed cases, the district court decided to address the

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[4] The jointly managed cases include: *Kluti Kaah Native Village of Copper Ctr. v. Alaska*, No. A90-0004-CV, *Fish & Game Fund v. Alaska Bd. of Fisheries*, No. A92-0443-CV, *Peratrovich v. United States*, No. A92-0734-CV, *Native Village of Stevens v. McVee*, No. A92-0567-CV, and *Native Village of Quinhagak v. United States*, No. A93-0023-CV.

fundamental issue of whether navigable waters are public lands before resolving other issues.[5]

Katie John argued that public lands include virtually all navigable waters, by virtue of the federal navigational servitude. The state contended that public lands exclude navigable waters. Prior to oral argument before the district court, the federal agencies agreed with the state. But at oral argument, those agencies modified their position, arguing that public lands include those navigable waters in which the federal government has an interest under the reserved water rights doctrine.

On cross-motions for summary judgment, the district court concluded that public lands include all navigable waters encompassed by the navigational servitude. Subsequently, the district court stayed its decision and certified for interlocutory appeal the issue of whether public lands include navigable waters.[6] Both the state and the federal agencies appeal.

## II. ANALYSIS

We consider two questions when we review an agency's construction of a statute that it administers.

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[5] The district court also characterized as fundamental the issue of whether ANILCA authorizes federal agencies to manage subsistence fishing and hunting on public lands in the absence of consistent Alaska laws. As discussed *supra* at note 2, that issue is not before us.

[6] Similarly, it certified the issue of whether ANILCA authorizes federal agencies to manage subsistence fishing and hunting on public lands in the absence of consistent Alaska laws for interlocutory appeal. *But see supra* at note 2.

*Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984). First, we consider "whether Congress 'has directly spoken to the precise question at issue' either in the statute itself or in the legislative history." *Railway Labor Executives' Ass'n v. ICC*, 784 F.2d 959, 963 (9th Cir.1986) (quoting *Chevron*, 467 U.S. at 842, 104 S.Ct. at 2781). Second, if Congress has not directly spoken to that precise question, we consider "whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2782.

Under ANILCA, "the term 'public lands' means land situated in Alaska which . . . are Federal lands." 16 U.S.C. § 3102(3). "The term 'Federal land' means lands the title to which is in the United States." 16 U.S.C. § 3102(2). And "[t]he term 'land' means lands, waters, and interests therein." 16 U.S.C. § 3102(1). In other words, public lands are lands, waters, and interests therein, the title to which is in the United States. *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 548 n. 15, 107 S.Ct. 1396, 1405-06, n. 15, 94 L.Ed.2d 542 (1987).

As noted above, the parties dispute whether navigable waters are public lands. At one extreme, the state maintains that ANILCA's definition of public lands excludes all navigable waters because the federal government does not hold title to them by virtue of the navigational servitude or the reserved water rights doctrine. At the other extreme are Katie John and amici curiae Peratrovich Plaintiffs who argue that all navigable waters are public lands. Katie John says this is so because the navigational servitude defines the scope of public lands. The Peratrovich Plaintiffs say this is so because, in ANILCA,

Congress expressed its intent to exercise its Commerce Clause powers to regulate subsistence fishing in navigable waters.[7] In the middle are federal agencies contending that public lands include certain navigable waters, defined by the reserved water rights doctrine.[8]

ANILCA's language and legislative history indicate clearly that Congress spoke to the precise question of whether *some* navigable waters may be public lands. They clearly indicate that subsistence uses include subsistence fishing. *See, e.g.*, 16 U.S.C. § 3113. And subsistence fishing has traditionally taken place in navigable waters. Thus, we have no doubt that Congress intended that public lands include at least some navigable waters.[9]

Unfortunately, ANILCA's language and legislative history do not give us the clear direction necessary to find that Congress spoke to the precise question of *which* navigable waters are public lands. ANILCA itself refers only to "lands, waters, and interests therein, the title to which is in the United States." It makes no reference to

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[7] In addition to their Commerce Clause argument, amici curiae Peratrovich Plaintiffs join in Katie John's navigational servitude argument.

[8] In addition to their navigational servitude and Commerce Clause arguments, Katie John and amici curiae Peratrovich Plaintiffs alternatively contend that the reserved water rights doctrine defines the scope of public lands.

[9] Our interpretation of the term public lands in this case will not allow the United States to usurp state power over navigable waters elsewhere. ANILCA applies only to Alaska and our interpretation of its definition of public lands is necessary to give meaning to its purpose of providing an opportunity for a subsistence way of life.

navigable waters. The legislative history is also unhelpful, containing only a single reference to navigable waters. *See* 126 Cong.Rec. 20278-80 (Nov. 12, 1980) (statement of Rep. Udall). Lacking clear direction, we must decide whether the federal agencies' conclusion that public lands include some navigable waters under the reserved water rights doctrine is based on a permissible construction of the statute.

A. Navigational Servitude

The navigational servitude describes the paramount interest of the United States in navigation and the navigable waters of the nation. *United States v. Certain Parcels of Land*, 666 F.2d 1236, 1238 (9th Cir.1982). It derives from the Commerce Clause. *Kaiser Aetna v. United States*, 444 U.S. 164, 177, 100 S.Ct. 383, 391-92, 62 L.Ed.2d 332 (1979). It is "a concept of power, not of property." *Certain Parcels*, 666 F.2d at 1238 (citing *United States v. Twin City Power Co.*, 350 U.S. 222, 224-25, 76 S.Ct. 259, 260-61, 100 L.Ed. 240 (1956)).

We have held that the navigational servitude is not "public land" within the meaning of ANILCA because the United States does not hold title to it. *City of Angoon v. Hodel*, 803 F.2d 1016, 1027 n. 6 (9th Cir.1986), *cert. denied*, 484 U.S. 870, 108 S.Ct. 197, 98 L.Ed.2d 148 (1987). Contrary to the district court's opinion, the Supreme Court has not limited that holding. In *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987), the Court rejected the assertion that the Outer Continental Shelf (OCS) is not "Federal land" because the United States does not hold title to it. *Id.* at 548 n. 15, 107

S.Ct. at 1406 n. 15. The Court explained in dictum that, while the United States may not hold "title" to the OCS, it was hesitant to conclude that the United States did not have "title" to "any interests therein." *Id.* But its dictum indicates only that, while the United States may not hold title to land, it may hold title to interests (e.g., mineral rights) in that land.

For this reason, we reject the argument that the navigational servitude is an "interest . . . the title to which is in the United States," such that all navigable waters are public lands within the meaning of ANILCA.

B. Commerce Clause

Neither the language nor the legislative history of ANILCA suggests that Congress intended to exercise its Commerce Clause powers over submerged lands and navigable Alaska waters. Although Congress explicitly invoked its authority under the Commerce Clause to protect and provide the opportunity for continued subsistence uses on the public lands, *see* 16 U.S.C. § 3111(4), its invocation of that authority is also consistent with an implicit reservation of waters under the reserved water rights doctrine.

Congressman Morris Udall inserted a statement in the Congressional Record that ANILCA's definition of public lands included all navigable waters throughout Alaska. *See* 126 Cong.Rec. 29260, 20278-80 (Nov. 12, 1980) (statement of Rep. Udall). He did so, however, after the Senate had passed ANILCA, after the House had finished debating it, and shortly before the House voted on it. His views deserve little weight. *See NLRB v. Fruit & Vegetable*

*Packers & Warehouseman*, 377 U.S. 58, 66, 84 S.Ct. 1063, 1068, 12 L.Ed.2d 129 (1964) ("these statements could represent only the personal views of these legislators, since [they] were inserted in the Congressional Record after passage of the Act").

We reject the argument that Congress expressed its intent to exercise its Commerce Clause powers to regulate subsistence fishing in all Alaskan navigable waters.

C. Reserved Water Rights

Under the reserved water rights doctrine, when the United States withdraws its lands from the public domain and reserves them for a federal purpose, the United States implicitly reserves appurtenant waters then unappropriated to the extent needed to accomplish the purpose of the reservation. *Cappaert v. United States*, 426 U.S. 128, 138, 96 S.Ct. 2062, 2069, 48 L.Ed.2d 523 (1976). The United States may reserve "only that amount of water necessary to fulfill the purpose of the reservation." *Id.* at 141, 96 S.Ct. at 2071. The United States' authority to reserve unappropriated waters derives from the Commerce Clause and the Property Clause. *Id.* at 138, 96 S.Ct. at 2069.

In determining whether the reserved water rights doctrine applies, we must determine whether the United States intended to reserve unappropriated waters. *Id.* at 139, 96 S.Ct. at 2069-70. Intent is inferred if those waters are necessary to accomplish the purposes for which the land was reserved. *Id.*; *United States v. New Mexico*, 438 U.S. 696, 702, 98 S.Ct. 3012, 3015, 57 L.Ed.2d 1052 (1978). It follows that courts must conclude that "without the

water the purposes of the reservation would be entirely defeated." *Id.* at 700, 98 S.Ct. at 3014.

The United States has reserved vast parcels of land in Alaska for federal purposes through a myriad of statutes.[10] In doing so, it has also implicitly reserved appurtenant waters, including appurtenant navigable waters, to the extent needed to accomplish the purposes of the reservations. By virtue of its reserved water rights, the United States has interests in some navigable waters. Consequently, public lands subject to subsistence management under ANILCA include certain navigable waters.

For these reasons, we hold to be reasonable the federal agencies' conclusion that the definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine. We also hold that the federal agencies that administer the subsistence priority are responsible for identifying those waters.

## III. CONCLUSION

We recognize that our holding may be inherently unsatisfactory. By holding that public lands include some specific navigable waters as a result of reserved water

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[10] These statutes include, but are not limited to, acts reserving land for national parks, forests and wildlife preserves, the Statehood Act, the Alaska Native Claims Settlement Act and ANILCA itself.

rights, we impose an extraordinary administrative burden on federal agencies. We accept a complicated regulatory scheme requiring federal and state management of navigable waters. Let us hope that the federal agencies will determine promptly which navigable waters are public lands subject to federal subsistence management. As long as federal *and* state regulation is necessary, we expect the federal agencies and the state to cooperate fully to protect and provide the opportunity for subsistence fishing in navigable waters.

If we were to adopt the state's position, that public lands exclude navigable waters, we would give meaning to the term "title" in the definition of the phrase "public lands." But we would undermine congressional intent to protect and provide the opportunity for subsistence fishing.

If we were to adopt Katie John's position, that public lands include all navigable waters, we would give federal agencies control over all such waters in Alaska. ANILCA does not support such a complete assertion of federal control and the federal agencies do not ask to have that control.

The issue raised by the parties cries out for a legislative, not a judicial, solution. If the Alaska Legislature were to amend the state constitution or otherwise comply with ANILCA's rural subsistence priority, the state could resume management of subsistence uses on public lands including navigable waters. Neither the heavy administrative burden nor the complicated regulatory scheme that may result from our decision would be necessary. If Congress were to amend ANILCA, it could clarify both

the definition of public lands and its intent. Only legislative action by Alaska or Congress will truly resolve the problem.

REVERSED AND REMANDED.

HALL, Circuit Judge, dissenting:

I.

The issue in this case should be a simple one to resolve: Is the fish camp located in navigable waters at the confluence of the Tanaga Creek and Copper River, in the midst of the Wrangell-St. Elias National Park, "public land" for the purposes of Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. §§ 3100, et seq.? It is, unfortunately, an incredibly complex issue[1] whose resolution will impact all the navigable waters in Alaska. Because I feel that we, as judges are not empowered to resolve this issue without direction from Congress, I dissent.

I agree with the majority that ANILCA defines "public land" as "lands, waters, and interests therein, the title to which is in the United States." Slip op. at 15741-42; 16 U.S.C. § 3102; *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 548 n.15 (1987).

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[1] In *Native Village of Quinhagak v. United States*, 35 F.3d 388, 392 (9th Cir. 1994), one panel of this Circuit held that this issue – whether "public lands" includes navigable waters – presented a "serious question" for preliminary injunction purposes. That panel has a gift for understatement.

Given this definition, this appears to be an easy case at first blush. Because the fish camp is in the midst of a National Park, the United States would seem to have title to all land and waters within the Park. 16 U.S.C. § 410hh(9) (creating Wrangell-St. Elias National Park and Preserve); S. Rep. 96-413, 1980 U.S.C.C.A.N. 5070 (noting that United States owns 7,990,000 acres of the Park). If so, the Park would be "public land" and ANILCA would apply.

One wrinkle in the facts of this case prevents the solution from being so simple, however. The fish camp lies in navigable waters. Under ANILCA, "public land" does not include land "validly . . . granted to . . . the State under any other provision of Federal Law." 16 U.S.C. § 3102(3)(A). The Submerged Lands Act of 1953 granted to the states all federal interests in the "lands beneath navigable waters." 43 U.S.C. § 1311(c) ("The United States hereby releases and relinquishes unto said States . . . all right, title and interest of the United States, if any it has, in and to all lands [beneath navigable waters], improvements, and natural resources."); *State of Alaska v. Athna, Inc.*, 891 F.2d 1401, 1403 (9th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990) ("States generally hold title to the lands underlying navigable rivers within their boundaries.").[2]

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[2] None of the exceptions to the Submerged Lands Act apply. Section 3101(f) carves out the first exception: The definition of "lands beneath navigable waters" excludes land grants from the United States to third persons. 16 U.S.C. § 3101(f). Neither party contends that the United States deeded Alaska's navigable waters to a third party.

Section 1313 includes two more exceptions. Under the first, the United States retains ownership over "all tracts or parcels of

Alaska therefore has title to the water within and land beneath the river containing the fish camp.

Given this analysis, the United States does not have "title" to the "land or water" containing the fish camp. The only way the fish camp can lie on "public land" as

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land together with all accretions thereto" which it had reserved at the time of statehood, or which it later acquires by condemnation. 16 U.S.C. § 3113(a). Since only dry land can have accretions, *Black's Law Dictionary* 19 (5th ed. 1979) (the term accretion is "usually applied to the graduate and imperceptible accumulation of land by natural causes"), this section does not apply to the land beneath navigable waters.

The second part of § 1313 excepts lands beneath navigable waters "held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians." 16 U.S.C. § 3112(b). Title to Alaska's navigable waters passed to Alaska at the time of its statehood, in 1959. Alaska Statehood Act, § 6(m), 72 Stat. 339, 343 (1959) ("The Submerged Lands Act of 1953 . . . shall be applicable to the State of Alaska . . ."). To prevent the automatic transfer of title, the United States would have to show that it was holding, land for the benefit of Native Alaskans in 1959; a later reservation would not reclaim land already given away. While it is clear that the native Alaskans are considered Indians, *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918) (applying presumption in favor of Indians to Alaskan natives), and it is probable that the Wrangell-St. Elias National Park was created in 1980 for the benefit of the Native Alaskans under ANILCA, *see* 16 U.S.C. § 410hh(9) (establishing Wrangell-St. Elias Park and referring to subsistence priorities of ANILCA), it is doubtful that the United States was holding that land for the benefit of the native Alaskans *in 1959*, 21 years before Congress expressed any intent to use the Park land to benefit Alaskan natives. The Ninth Circuit requires great proof of intent. *See Athna*, 891 F.2d at 1405-06 (refusing to conclude under similar language in § 4 of the Alaska Statehood Act, that the United States held land for the Alaskan natives absent express showing of intent to do so).

§ 3102 defines it is if the United States has "title" to any "interest" in those navigable waters.

To me, the crucial issue is one of statutory construction. What did Congress mean by "interest"? Congress left us few bread crumbs to follow because neither the statute itself nor its voluminous legislative history defines "interest."[3] Even the general legal definition of "interest" is unavailing. *See Black's Law Dictionary* 729 (5th ed. 1979) ("The word 'interest' is used in the Restatement of Property both generally to include varying aggregates of rights, privileges, powers and immunities and distributively to mean any one of them.").

This problem of lack of definition is compounded when we consider that the definition chosen will have far-reaching implications. If "interest" is defined narrowly, to comply with the traditional property law notion of "interest," then ANILCA would apply only if the United States could show a property interest, such as an easement, over these waters. If, on the other hand, "interest" is defined broadly, ANILCA may apply if the United

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[3] ANILCA's legislative history and its subsequent interpretation do contain conflicting conclusions about ANILCA's application to navigable waters. *Compare* 126 Cong. Rec. 29260, 29280 (1980) (statement of Rep. Udall) ("[I]t has always been our intent to apply the subsistence preference to all fish stocks in the waters of Alaska.") *with* 57 Fed. Reg. 22,940, 22,942 (1992) (Sec. of Interior) ("Because the United States does not generally own title to the submerged lands beneath navigable waters, Alaska, the public lands definition in ANILCA and these regulations generally excludes navigable waters."). Since these *conclusions* shed no light on how Congress intended "interest" to be defined and since they conflict in any event, they are of little use to my analysis.

States points to any sovereign power it may have over the waters at issue. Under the first definition, few if any of Alaska's navigable waters would fall under ANILCA; under the second, nearly all would. There is far more at stake here than one fishing camp.

I agree with the majority that Congress, in order to achieve its stated purpose, must have intended *some* navigable waters to fall under ANILCA so that defining "interest" narrowly to exclude all navigable waters is probably incorrect. Slip op. at 15741-42. I also concede that ambiguities in statutes should be construed in favor of the native Alaskans. *People of Village of Gambell v. Clark*, 746 F.2d 572, 581 (9th Cir. 1984) ("Ambiguities in Title VIII [of ANILCA] must be resolved in favor of the Alaska Native people."). However, I do not think it is for us to decide, on the basis of these two factors, that Congress intended "interest" to be defined so broadly so as to bring *all* of Alaska's navigable waters under ANILCA. Such a drastic change in the amount of control exercised by the federal government over all navigable waters in Alaska can only come from Congress. *See Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979) (requiring clear evidence of congressional intent to change the status quo).

II.

Even if I believed it was for us to make this choice, I do not believe that we could give effect to Congress' intent if we wanted to. None of the property doctrines currently available to us – regardless of how broadly we

define "interest" – could bring Alaska's navigable waters under ANILCA.

The majority embraces the doctrine of reserved water rights when it holds that the federal government impliedly reserved rights to the navigable waters within the Wrangell-St. Elias National Park when it withdrew that Park from the public domain. Slip op. at 15744-45; 16 U.S.C. § 410hh(9) (reserving Park but not expressly reserving navigable waters within the Park). The reserved water rights doctrine, which derives from the Commerce and Property Clauses, permits the United States impliedly to reserve the specific *quantity* of water necessary to fulfill the purpose of a federal reservation. *See Cappaert v. United States*, 426 U.S. 128, 138 (1976); *United States v. New Mexico*, 438 U.S. 696, 700 (1978).

Even assuming that Congress intended to reserve Alaska's navigable waters, both the case law and this doctrine's basis in the Property Clause limit this doctrine: The federal government can only reserve waters running over land that it owns. *See Hynes v. Grimes Packing Co.*, 337 U.S. 86, 110-16 (1949) (implying reservation of navigational waters already owned by the United States); *Alaska Pacific Fisheries*, 248 U.S. at (same); *Cappaert*, 426 U.S. 128 (implying reservation of non-navigable waters owned by the United States); U.S. Const., Art IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respect [sic] Territory or other Property *belonging to the United States*") (emphasis added); *cf. Athna*, 891 F.2d at 1401-04 (rejecting claim of implied reservation of navigable waters owned by state). Because *Alaska* has title to its navigable waters

under the Submerged Lands Act, the United States cannot reserve these waters. Moreover, the task of determining the exact *quantity* of water, from each body of navigable water, necessary to achieve the Congressional goal of subsistence fishing would be an administrative nightmare.

The next doctrine, the Commerce Power, is similarly inadequate. The Commerce Power is the acknowledgement that "Congress has extensive authority over this Nation's water under the Commerce Clause." *Kaiser Aetna v. United States*, 444 U.S. 164, 173 (1979) (citing *Gibbons v. Ogden*, 22 U.S. 1, 189 (1824)). This authority "is as broad as the needs of commerce," *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 426 (1940).

This Power would seem to apply here. Even when Congress quitclaimed its ownership of navigable waterways in the Submerged Lands Act, it specifically retained this Power. 43 U.S.C. § 1314(a) ("The United States retains all its . . . powers of regulation and control of . . . navigable waters for the constitutional purposes of commerce [and] navigation."); *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 282 (1977). Moreover, ANILCA's partial basis in the Commerce Clause, *see* 16 U.S.C. § 3111(4), might be construed as an implicit invocation of this Power. If it were, the United States could regulate subsistence uses in these waters as an exercise of the Commerce Power.

Because it is grounded in the Commerce Clause, however, the Commerce Power must satisfy traditional Commerce Clause analysis. *Kaiser Aetna*, 444 U.S. at 174. (holding that this Power is "viewed in terms of more

traditional Commerce Clause analysis"). ANILCA's subsistence provisions fail this analysis. Congress can only regulate activities that have "a substantial relationship to interstate commerce" or which "substantially affect" interstate commerce. *United States v. Lopez*, 115 S. Ct. 1624, 1629-30 (1995). It would be hard to argue that the priority of a handful of Alaskan natives over subsistence fishing in one river in Alaska would "substantially affect" interstate commerce. Although the natives might buy less fish from others, this would not have any noticeable effect on interstate demand for fish. Even if every rural Alaskan subsistence fished and never bought fish, it is still unlikely that interstate commerce would be "substantially affected." *Compare Wickard v. Filburn*, 317 U.S. 111 (1942) (finding that home consumption of wheat by every person in the United States would decrease demand for commercial wheat and would thereby defeat the purpose of the Agricultural Adjustment Act of 1938); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (finding that nationwide discrimination against African-Americans harms interstate commerce). Because the impact of ANILCA's subsistence priority in Alaskan navigable waters would not "substantially affect" interstate commerce, this priority cannot be upheld under the Commerce Power.

The final doctrine that might apply, the navigational servitude, is likewise inappropriate. Like the Commerce Power the navigational servitude is a power derived from the Commerce Clause and is not a species of property. *See City of Angoon v. Hodel*, 803 F.2d 1016, 1028 n.6 (9th Cir. 1986), *cert. denied*, 484 U.S. 870 (1987) ("[T]he United States does not hold title to the navigational servitude."); *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624,

628 (1961) ("The [navigational] servitude only encompasses the exercise of this federal *power.*") (emphasis added); *United States v. Twin City Power Co.*, 350 U.S. 222, 225-26 (1956) ("The interest of the United States in the flow of a navigable stream originates in the Commerce Clause. That clause speaks in terms of power not of property.").

Although both the navigational servitude and the Commerce Power share a common origin in the Commerce Clause, the servitude has a narrower purpose than the Power. *Boone v. United States*, 944 F.2d 1489, 1493 (9th Cir. 1991) ("[T]he navigational servitude is distinct from the power to regulate navigable waters."). The navigational servitude gives the federal government, for the sole purpose of seeing that the waterways remain navigable, the power to condemn land beneath navigable waterways without compensation. *See Kaiser Aetna*, 444 U.S. at 177 ("The navigational servitude . . . gives rise to the authority in the Government to assume that such streams retain their capacity to serve as continuous highways for the purpose of navigation in interstate commerce."); *Boone*, 944 F.2d at 1494 (holding that the servitude "generally relieves the government from the obligation to pay compensation for acts interfering with the ownership of riparian, littoral, or submerged lands which, if not for the fact that a waterway was involved, would require compensation under the Fifth Amendment."). Because the subsistence provisions of ANILCA do not further any navigational purpose, the servitude cannot be the basis to apply ANILCA.

Thus, we are unable to resolve this issue in this case, even if it were our place to do so.[4]

III.

It would be much more expedient if we could write on the slate Congress has left blank. It seems fairly clear that ANILCA's objectives would be best achieved by bringing all Alaskan navigable waters under ANILCA's reach, subject to the limitation of reasonable and noncommercial subsistence use.[5]

However, Congress has not so provided. We, as judges, have been asked to decide whether Alaska or the United States has control over all of Alaska's navigable waters. This is a decision we are neither qualified to, nor in this case capable of, deciding or implementing.

I am thus compelled to conclude that the United States has had no "interest" in Alaska's navigable waters since it gave them away in 1959. Those waters, including the fishing pond at issue here, are therefore not "public

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[4] Thus, Congress will probably have to condemn these waters or take some other action sufficient to make these doctrines applicable.

[5] A major objection to granting a subsistence priority to rural Alaskans is the fear that the rural Alaskans will abuse this priority and commercially exploit the fisheries to the detriment of non-rural Alaskans. This fear is misplaced, however, if ANILCA's provisions regarding the scope of the priority are strictly followed. ANILCA forbids "subsistence uses" that are "wasteful," 16 U.S.C. § 3112, and excludes from "subsistence uses" fish caught for commercial sale, 16 U.S.C. § 3113(2)(B). Thus, ANILCA already possesses safeguards against this type of abuse.

land" subject to ANILCA's subsistence priorities. For this reason, I would reverse the decision of the district court and wait for Congress to make its intentions clear.

**Michael TOTEMOFF, Petitioner,**
**v.**
**STATE of Alaska, Respondent.**
**No. S-6151**
**Court of Appeals No. A-4276**
**Trial Court No. 3WH-91-25 Cr.**
Supreme Court of Alaska.
Oct. 20, 1995.

Appearances: Paul E. Malin, Assistant Public Defender, John B. Salemi, Public Defender, Anchorage, for Petitioner. Joanne Grace, Assistant Attorney General, Anchorage, Bruce M. Botelho, Attorney General, Juneau, for Respondent.

Before: MOORE, Chief Justice, RABINOWITZ, MATTHEWS, COMPTON and EASTAUGH, Justices.

OPINION

MATTHEWS, Justice.

Subsistence hunter Mike Totemoff shot a deer with the aid of a spotlight in December 1990. The deer was killed on federal land, Naked Island in Prince William Sound. However, Totemoff was in a skiff in navigable waters surrounding Naked Island when he shined his spotlight at the deer and fired the fatal shot.

Totemoff was charged with violating 5 Alaska Administrative Code (AAC) 92.080(7), which prohibits hunting with the aid of an artificial light. Totemoff moved to have the indictment dismissed, arguing that the State did not have jurisdiction to prosecute him and that the regulation prohibiting spotlighting was invalid. To support some of his arguments, Totemoff presented evidence

that spotlighting is a customary and traditional means of hunting deer for subsistence in his native community of Tatitlek. The district court ruled that the State did have jurisdiction to prosecute Totemoff. The district court held that Alaska law prohibits subsistence hunters from challenging, in a criminal proceeding, the regulations under which they are prosecuted.

The case proceeded to trial, and Totemoff was convicted. The court of appeals affirmed. *Totemoff v. State*, 866 P.2d 125 (Alaska App.1993). We granted Totemoff's petition for hearing.

We must first decide whether the State has criminal jurisdiction over Totemoff, as jurisdiction is a threshold issue which must be decided before this court can address other issues presented in an appeal. *See Nattrass v. State*, 554 P.2d 399, 401 (Alaska 1976). Jurisdiction can be established either by finding that the State has the power to apply the spotlighting ban to subsistence hunters on federal land, or by determining that the State has exclusive jurisdiction over the navigable waters from which Totemoff fired his rifle. If we find that the State does have jurisdiction, we will then consider Totemoff's state law challenge to the anti-spotlighting regulation.

## I. JURISDICTION OVER FEDERAL LAND

A state is free to enforce its civil or criminal laws on federal land within its boundaries unless the state consents to the exercise of exclusive federal jurisdiction, the state voluntarily cedes exclusive jurisdiction to the federal government, or the state's laws are preempted by federal law. *California Coastal Comm'n v. Granite Rock Co.*,

480 U.S. 572, 580-81 (1987); *Kleppe v. New Mexico*, 426 U.S. 529, 542-43 (1976); see also *Arizona v. Manypenny*, 445 F.Supp. 1123, 1125-26 (D.Ariz.1977), *rev'd on other grounds*, 451 U.S. 232 (1981). Alaska has not voluntarily ceded exclusive jurisdiction over hunting on federal land to the federal government or consented to exclusive federal control. Therefore, the State lacks jurisdiction to enforce its spotlighting ban against subsistence hunters on federal land only if enforcement is preempted by federal law.

Federal law can preempt state law in three ways. First, Congress may expressly declare that state law is preempted. Second, state law is preempted if Congress intends the federal government to occupy a field exclusively. Third, federal law preempts state law if the two actually conflict. *See, e.g., Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604-05 (1991); *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990). Totemoff argues that application of the spotlighting ban to him is preempted by the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. §§ 3101- 3233 (1988).

No provision in ANILCA expressly preempts state enforcement of state hunting laws against subsistence hunters on federal land. Thus, we must determine whether Congress intended for the federal government to exclusively occupy the field of regulation of subsistence activities when it enacted ANILCA, or whether state law actually conflicts with ANILCA.

*A. Intent to Occupy Field*

Congressional intent to occupy a field can be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the State to supplement it," or if a federal law "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *English*, 496 U.S. at 79 (alteration in original) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

However, " '[w]here . . . the field which Congress is said to have pre-empted' includes areas that have 'been traditionally occupied by the States,' congressional intent to supersede state laws must be 'clear and manifest.' " *Id.* (alteration in original) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). "When considering pre-emption, '[courts] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Mortier*, 501 U.S. at 605 (quoting *Rice*, 331 U.S. at 230).

Regulation of hunting is an area that has been traditionally occupied by the states. It is part of the historic police power of states. *See State v. Coffee*, 556 P.2d 1185, 1194 (Idaho 1976); *State ex rel. Nepstad v. Danielson*, 427 P.2d 689, 691 (Mont.1967); *see also Montana v. United States*, 450 U.S. 544, 564 n. 13 (1981). Therefore, we may find that Congress intended to occupy the field of regulation of subsistence hunting on federal land only if Congress' purpose was clear and manifest.

ANILCA does not disclose such a clear and manifest purpose. Title VIII of ANILCA governs subsistence hunting and fishing. 16 U.S.C. §§ 3111-26. Section 804 of Title VIII requires the taking of fish and wildlife on public lands for subsistence purposes to be accorded priority over the taking of fish and wildlife for other purposes. 16 U.S.C. § 3114. Section 802 states that it is the purpose of Congress "to provide the opportunity for rural residents engaged in a subsistence way of life to do so." 16 U.S.C. § 3112(1). Section 814 requires the Secretaries of Interior and Agriculture to promulgate regulations necessary to carry out their responsibilities under Title VIII. 16 U.S.C. § 3124. Sections 805(a)-(c) of Title VIII provide for the establishment of a network of regional advisory councils and local advisory committees to advise the Secretaries in the exercise of their authority under ANILCA. 16 U.S.C. §§ 3115(a)-(c).

Under § 805(d), the federal government was not to implement §§ 805(a)- (c) if Alaska enacted laws of general applicability providing "for the definition, preference, and participation specified" in Title VIII. 16 U.S.C. § 3115(d). Alaska did enact such laws,[1] but we struck down the rural preference provision of those laws as contrary to the Alaska Constitution in *McDowell v. State*, 785 P.2d 1 (Alaska 1989). As a result, the State fell out of compliance with ANILCA. The federal government subsequently promulgated temporary and then permanent regulations governing subsistence hunting on public land and implementing §§ 805(a)-(c) of Title VIII. 55 Fed.Reg. 27,114 (1990); 57 Fed.Reg. 22,940 (1992).

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[1] *See* ch. 151, SLA 1978; ch. 52, SLA 1986.

Even though Title VIII has been fully implemented, it does not create a scheme of federal regulation so pervasive that there is no room for state regulation to supplement it. Under Title VIII, the Secretaries of Interior and Agriculture implement ANILCA's subsistence priority and opportunity provisions with the participation and assistance of local and regional advisory councils. This does not foreclose the State from promulgating hunting and fishing regulations which may affect subsistence hunters on federal land, so long as those regulations do not conflict with federal laws or regulations. Nothing in Title VIII discloses a clear and manifest purpose to prohibit all state regulation of subsistence hunting. Nothing affirmatively prohibits the State from engaging in such regulation.

Moreover, § 1314 of ANILCA states, "Nothing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands except as may be provided in [Title VIII] of this chapter." 16 U.S.C. § 3202. Again, no provision in Title VIII clearly and manifestly prevents the State from enforcing its general hunting laws against subsistence hunters on federal land.

In addition, § 802(3) of Title VIII provides that the policy of Congress is that "[f]ederal land managing agencies, in managing subsistence activities on the public lands . . . shall cooperate with . . . appropriate State and Federal agencies." 16 U.S.C. § 3112(3). This section suggests that Congress did not intend a federal regulatory scheme so pervasive that there would be no room for state regulation to supplement it.

Finally, when the federal regulations promulgated pursuant to ANILCA were passed, the federal agencies administering ANILCA explained that the regulations would permit the State to continue to participate in the management of subsistence hunting on public land:

> *[T]hese regulations anticipate an interactive process between the State fish and game regulatory procedure.* The State, because of its constitution, cannot provide a preference for rural residents with customary and traditional use of fish and wildlife as required by ANILCA. *The State can facilitate harvest by rural residents through various regulations dealing with* ***means and methods of take*** *and perhaps other mechanisms.*
>
> If State regulations allow rural residents the opportunity to obtain their customary and traditional take and uses of fish and wildlife resources, the Federal regulations may closely parallel State regulations. *The Federal program anticipates a highly cooperative, interactive relationship with the State system.* To the extent that cooperation exists, the Federal program will be able to minimize change to traditional State regulation and management of fish and wildlife.

55 Fed.Reg. 27,114, 27,119 (1990) (emphasis added). Thus, the federal government clearly contemplated that Alaska means and methods regulations, the kinds of regulations at issue in this case, would be effective on federal land.

Since the language of ANILCA does not demonstrate a clear and manifest Congressional intent to preempt all state regulation affecting subsistence hunting and fishing on federal land, and since the federal agencies administering ANILCA have interpreted ANILCA as allowing

such state regulation, we hold that Congress did not intend for the federal government to exclusively occupy the field of subsistence hunting and fishing regulation.

*B. Actual Conflict*

We must next decide whether federal law actually conflicts with the enforcement of the state spotlighting ban against Totemoff on federal land. There is no direct conflict between Alaska's anti-spotlighting regulation, 5 AAC 92.080(7), and any federal statute or regulation. At the time of Totemoff's arrest, a federal subsistence hunting regulation virtually identical to the state regulation prohibited taking game with the aid of a spotlight. *Compare* 36 C.F.R. § 242.23(b)(1)(vii) (1990) *with* 5 AAC 92.080(7) (1990).

Totemoff's principal federal claim, however, is that federal law preempts application of the state spotlighting ban to him because federal law allows him to defend against prosecution on the grounds that spotlighting is a customary and traditional method of taking deer, while state law does not permit such a defense.[2] Totemoff relies on *United States v. Alexander*, 938 F.2d 942 (9th Cir.1991).

In *Alexander*, the defendants sold herring roe in violation of an Alaska regulation prohibiting sale of herring roe. *Id.* at 944-45. The court held that the defendants were

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[2] In *State v. Morry*, 836 P.2d 358, 370 (Alaska 1992), we held that the Boards of Fish and Game "have the discretion, *but are not mandated*, to take into consideration the traditional and customary methods of subsistence takings in their formulation of subsistence regulations." (Emphasis added.)

permitted to defend against criminal prosecution on the basis that they were engaged in customary trade for subsistence purposes, a subsistence use protected by ANILCA. *Id.* at 948. In deciding that customary trade was protected by ANILCA, the court cited ANILCA's definition of "subsistence uses" – "the customary and traditional uses by rural Alaska residents of wild renewable resources . . . for barter, or sharing for personal or family consumption; *and for customary trade.*" *Id.* at 946 (alteration in original).

The full text of ANILCA's definition of "subsistence uses" is:

> [T]he customary and traditional *uses* by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.

ANILCA § 803, 16 U.S.C. § 3113 (emphasis added). This definition only covers various uses of subsistence resources. It does not cover traditional means and methods of hunting. And no other provision in ANILCA creates a general right to use traditional means and methods of taking game.

Title VIII of ANILCA does specifically protect the use of traditional means of surface transportation for subsistence hunting. Section 811(b) of Title VIII states, "Notwithstanding any other provision of this Act or other law,

the Secretary shall permit on the public lands appropriate use for subsistence purposes of snowmobiles, motorboats, and other means of surface transportation traditionally employed for such purposes by local residents, subject to reasonable regulation." 16 U.S.C. § 3121(b). The protection of traditionally employed surface transportation methods implies that other traditional components of subsistence hunting or fishing, such as the use of certain guns, nets, or other equipment, are not exempt from state regulation.

Furthermore, numerous provisions in ANILCA require regulation of subsistence taking in accordance with sound wildlife management principles and the preservation of wildlife resources. *See* 16 U.S.C. §§ 3101(b), 3101(c), 3111(3), 3112(1), 3125(1). Restriction of traditional means and methods may be necessary to accomplish this goal. *See* ANILCA § 801(3), 16 U.S.C. § 3111(3) ("continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened . . . by taking of fish and wildlife in a manner inconsistent with recognized principles of fish and wildlife management").

In addition, no case law directly holds that ANILCA protects customary and traditional methods of hunting. There is a case, however, which could provide support for such a holding, *Native Village of Quinhagak v. United States*, 35 F.3d 388 (9th Cir.1994). In *Quinhagak*, the court ruled that several native villages were entitled to a preliminary injunction against the enforcement of an Alaska regulation barring the taking of rainbow trout for subsistence purposes. *Id.* at 395. The court held that the villages presented a showing of hardship sufficient to justify the preliminary injunction, since they demonstrated that

rainbow trout was an important food source for them. *Id.* at 393. The court then added:

> The Villages also presented evidence that the federal and state regulations interfere with their way of life and cultural identity. . . . They needed to prove nothing more in light of the clear congressional directive to protect the cultural aspects of subsistence living. 16 U.S.C. § 3111(1) [ANILCA § 801(1)] ("[T]he continuation of the opportunity for subsistence uses by rural residents of Alaska . . . is *essential to Native* physical, economic, traditional, and *cultural existence*. . . . ").

*Id.* at 394 (alteration in original).

It might be inferred from this language that ANILCA protects traditional subsistence taking means and methods which are part of the cultural identity and way of life of Natives. However, *Quinhagak* only held that the villages were entitled to a preliminary injunction and did not resolve the merits of any controversy concerning the interpretation of ANILCA. Though an argument can be made based on *Quinhagak* that ANILCA does protect customary and traditional means and methods, we conclude that more weight should be accorded to Congress' failure to mention means and methods in ANILCA's definition of "subsistence uses" and to Congress' specific grant of protection to traditional means of surface transportation.

We hold that ANILCA does not protect the use of a spotlight as a customary and traditional method of subsistence hunting, and thus there is no actual conflict between ANILCA and Alaska law. Therefore, federal law does not preempt enforcement of Alaska's spotlighting

ban against subsistence hunters on federal land, and the State does have jurisdiction over Totemoff.

## II. JURISDICTION OVER NAVIGABLE WATERS

Even if ANILCA does protect customary and traditional means and methods, thereby preempting state enforcement of the anti-spotlighting regulation against Totemoff on federal land, the State still has criminal jurisdiction if ANILCA does not apply to the navigable waters from which Totemoff shined his spotlight at the deer. Totemoff's conduct of taking a deer with the aid of an artificial light was committed partly in navigable waters and partly on federal land. If the elements of a crime are committed in different jurisdictions, "any state in which an essential part of the crime is committed" may assert jurisdiction. *State v. Scofield*, 438 P.2d 776, 784 (Ariz.App.1968). "If an offense is committed partly on federal and partly on non-federal property, both sovereigns have jurisdiction." *State v. Kirksey*, 647 S.W.2d 799, 804 (Mo.1983) (en banc).

*See also Lane v. State*, 388 So.2d 1022, 1028 (Fla.1980) (though fatal blow struck in Alabama, Florida has jurisdiction over murder if either premeditation to murder or felony underlying murder occurred in Florida); *Commonwealth v. Lanoue*, 95 N.E.2d 925, 926 (Mass.1950) (if a criminal act is committed in two jurisdictions, a state has jurisdiction over the act if the part of the act committed within that state has been declared to be punishable by its laws); *State v. Kills on Top*, 793 P.2d 1273, 1285-86 (Mont.1990) (Montana has jurisdiction over felony-murder even though victim killed in Wyoming because

underlying felony, kidnapping, occurred in Montana), *cert. denied*, 501 U.S. 1259 (1991); *People v. Fuller*, 586 N.Y.S.2d 366, 367-68 (N.Y.App.) (New York has jurisdiction over rape defendant, even though actual sexual assault may have taken place in Pennsylvania, because element of forcible compulsion occurred in New York), *appeal denied*, 591 N.Y.S.2d 144 (N.Y.1992); *Brown v. Market Dev., Inc.*, 322 N.E.2d 367, 372 (Ohio C.P. 1974) (Ohio would have jurisdiction over a person who stood in Ohio and fired a shot across the state border, killing someone in Indiana). *But see State v. Hall*, 19 S.E. 602, 604-05 (N.C. 1894) (North Carolina did not have jurisdiction over defendant who while standing in North Carolina shot victim in Tennessee, since no North Carolina statute criminalized the conduct which occurred in North Carolina or otherwise conferred jurisdiction upon the state).

In this case, Totemoff's act of shining a spotlight and firing the fatal shot, an essential part of the crime with which he was charged, unlawful taking of game, occurred on navigable waters. Moreover, Alaska law specifically criminalizes conduct which Totemoff committed solely on navigable waters. Alaska Statute 16.05.940(33) defines "take" as "taking, pursuing, hunting, fishing, trapping, or in any manner disturbing, capturing, or killing or attempting to take, pursue, hunt, fish, trap, or in any manner capture or kill fish or game." Totemoff took actions in navigable waters which constitute "pursuing," "hunting," "disturbing," and "attempting to take, pursue, hunt . . . or in any manner capture or kill" deer. Therefore, the State has jurisdiction over Totemoff, even if ANILCA preempts the application of the spotlighting ban on federal land, so long as ANILCA does not give the

federal government the power to regulate hunting and fishing in navigable waters.

ANILCA's subsistence priority applies only to "public lands." ANILCA § 804, 16 U.S.C. § 3114. Section 102 of ANILCA defines the term "public lands":

> (1) The term "land" means lands, waters, and interests therein.
>
> (2) The term "Federal land" means lands the title to which is in the United States after December 2, 1980.
>
> (3) The term "public lands" means land situated in Alaska which, after December 2, 1980, are Federal lands, except
>
> (A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law.

16 U.S.C. § 3102. Thus, "public lands" means lands, waters, and interests therein, the title to which is in the United States. But "public lands" does not include lands, waters, and interests therein which were transferred to Alaska under other federal laws.

Whether "public lands" includes navigable waters was the subject of a recent Ninth Circuit decision, *Alaska v. Babbitt* (Katie John), 54 F.3d 549 (9th Cir.1995), *petitions for cert. filed*, 63 U.S.L.W. 3819 (U.S. May 5, 1995) (No. 94-1829), 63 U.S.L.W. 3874 (U.S. June 2, 1995) (No. 94-1976). The *Katie John* court considered whether

ANILCA applies to navigable waters because of the federal government's navigational servitude or federal reserved water rights.

The navigational servitude is a dominant servitude, sometimes described as a "superior navigation easement," which allows the federal government to exercise its regulatory power over navigable waters in the interests of commerce without compensation for interference with private water rights. *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 627-28 (1961); *Boone v. United States*, 944 F.2d 1489, 1493-94 (9th Cir.1991). The servitude "is a concept of power, not of property." *United States v. Certain Parcels of Land Situated in Valdez*, 666 F.2d 1236, 1238 (9th Cir.1982). It is a "dominant right over navigable waters for purposes of improving and regulating navigation." *United States v. 119.67 Acres of Land, More or Less, Situated in Plaquemines Parish, La.*, 663 F.2d 1328, 1330 n. 5 (5th Cir.1981). The navigational servitude is derived from the Commerce Clause. *See United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 704 (1987); *Boone*, 944 F.2d at 1494 n. 9.

Under the reserved water rights doctrine, when Congress withdraws land from the public domain for a federal purpose, it implicitly reserves water necessary to accomplish the purposes of the reservation. *Cappaert v. United States*, 426 U.S. 128, 138 (1976); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 46 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981). "The United States acquires a water right vesting on the date the reservation was created, and superior to the rights of subsequent appropriators." *Colville*, 647 F.2d at 46. The amount of water reserved under the doctrine is limited to what is necessary to fulfill the

purpose of the land reservation. *Cappaert*, 426 U.S. at 141; *United States v. Adair*, 723 F.2d 1394, 1409 (9th Cir.1983), *cert. denied*, 467 U.S. 1252 (1984).

A reservation of water may be implied only where the water is necessary for the primary purpose of the federal reservation, not where the water merely serves secondary purposes of the reservation. *United States v. New Mexico*, 438 U.S. 696, 702 (1978); *Adair*, 723 F.2d at 1408-09. In determining the scope of implied reserved water rights, a court may look only to the primary purpose of a reservation at the time the land was first reserved by the federal government, and may not consider other purposes later given to the reservation. *See New Mexico*, 438 U.S. at 713-15. The reserved water rights doctrine has at times been treated as giving the government only a non-consumptive right to prevent others from using a supply of water in a manner that would deprive the federal reservation of the water necessary for its primary purpose; at other times, the doctrine has been interpreted as giving the United States the right to a specific amount of water. *Compare Cappaert*, 426 U.S. at 135, 143 *and Adair*, 723 F.2d at 1411 *with Arizona v. California*, 373 U.S. 546, 600-01 (1963) *and Colville*, 647 F.2d at 47.

The Ninth Circuit in *Katie John* decided that the navigational servitude is not an interest to which the United States holds title and ruled that the navigational servitude does not convert all Alaska navigable waters to "public lands" as defined in ANILCA. 54 F.3d at 553. In doing so, the court reversed a federal district court decision which held that the navigational servitude is an interest to which the United States holds title for the purposes of ANILCA. *John v. United States*, Nos.

A90-0484-CV, A92-0264-CV, 1994 WL 487830, at *17 (D.Alaska March 30, 1994). The Ninth Circuit also held in *Katie John* that reserved water rights are interests in land to which the federal government has title under ANILCA's definition of "public lands." 54 F.3d at 554.

We are not obliged to follow *Katie John*, since this court is not bound by decisions of federal courts other than the United States Supreme Court on questions of federal law. *In re F.P.*, 843 P.2d 1214, 1215 n. 1 (Alaska 1992), *cert. denied*, 113 S.Ct. 2441 (1993). Though the State was a party to *Katie John*, it is not collaterally estopped here as to the issues decided in that case because the applicability of ANILCA to navigable waters is a pure question of law which does not involve factual issues. *See State v. United Cook Inlet Drift Ass'n*, 895 P.2d 947, 954 (Alaska 1995) ("the State is permitted to relitigate unmixed questions of law so long as the subject matter of the second case is 'substantially unrelated' to that of the first"). We will follow *Katie John* only to the extent that its reasoning is persuasive.

For a number of reasons, we find that neither the navigational servitude nor reserved water rights bring navigable waters within ANILCA's definition of "public lands," and that the federal government has no authority based on the navigational servitude or the reserved water rights doctrine to regulate hunting and fishing in Alaska's navigable waters.

First, even if the navigational servitude or reserved water rights can be considered interests to which the United States holds title, the State has an interest in fish and wildlife located in navigable waters which precludes

federal regulation of such fish and wildlife, under s 102(3)(A) of ANILCA and the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-56 (1988). Section 102(3)(A) of ANILCA exempts from the definition of "public lands" "lands which have been . . . granted to the Territory of Alaska or the State under any other provision of Federal law." 16 U.S.C. § 3102(3)(A). As ANILCA § 102(1) defines "land" as "lands, waters, and interests therein," 16 U.S.C. § 3102(1), "public lands" does not include lands, waters, and interests therein granted to Alaska under another federal law.

A relevant interest in lands or waters is granted to Alaska by the Submerged Lands Act of 1953. Section 3(a) of the Act states:

> It is hereby determined and declared to be in the public interest that (1) *title to and ownership of* the lands beneath navigable waters within the boundaries of the respective States, and *the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said* lands and *natural resources* all in accordance with applicable State law be, and they *are*, subject to the provisions hereof, *recognized, confirmed, established and vested in and assigned to the respective States* or the persons who were on June 5, 1950,[3] entitled thereto under the law of the respective States in which the land is located,

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[3] Under the Alaska Statehood Act, "[t]he Submerged Lands Act of 1953 [is] applicable to the State of Alaska and the said State [has] the same rights as do [other] States thereunder." Pub.L. No. 85-508, § 6(m) (1958), *reprinted in* 48 U.S.C. following § 5 (1988).

> and the respective grantees, lessees, or successors in interest thereof.

43 U.S.C. § 1311(a) (emphasis added). Section 2(e) of the Act states, "[t]he term 'natural resources' includes . . . fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life." 43 U.S.C. § 1301(e).

The Submerged Lands Act thus gives Alaska ownership of, title to, and management power over the following: lands beneath the navigable waters of Alaska,[4] the navigable waters themselves,[5] and fish and other marine life located in Alaska's navigable waters. Under § 102(3)(A) of ANILCA, the definition of "public lands" in ANILCA therefore excludes navigable waters.

Furthermore, § 6(a) of the Submerged Lands Act specifically precludes the navigational servitude from being used to give the federal government power over

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[4] The term "lands beneath navigable waters" covers

> all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles.

43 U.S.C. § 1301(a)(2).

[5] The U.S. Supreme Court has referred to the Submerged Lands Act as a grant of "submerged lands and waters." *United States v. California*, 436 U.S. 32, 37 (1978).

fish or animals in state navigable waters. The section states:

> The United States retains all its *navigational servitude and rights in* and powers of regulation and control of said lands and *navigable waters* for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but *shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of* the lands and *natural resources which are specifically* recognized, confirmed, established, and *vested in* and assigned to the respective *States* and others *by section [3]* of this [Act].

43 U.S.C. § 1314(a) (emphasis added). Under this statute, the navigational servitude and other federal rights in navigable waters cannot give the federal government ownership of navigable waters or management rights over fish and animals in navigable waters, as those rights are reserved to the states by § 3 of the Submerged Lands Act.

The second reason supporting our decision that ANILCA does not give the federal government power to regulate hunting and fishing in navigable waters is that the navigational servitude and reserved water rights are not the type of property interests to which title can be held. Authorities disagree on whether the term "title" applies only to fee ownership of property or also covers lesser possessory interests such as lease interests. *Dover Veterans Council, Inc. v. City of Dover*, 407 A.2d 1195, 1196 (N.H. 1979); *see also United States v. Hunter*, 21 F. 615, 617 (C.C.E.D. Mo. 1884); *compare United States v. City of New*

*Brunswick*, 11 F.2d 476, 477 (3d Cir. 1926) ("the ownership of title means ownership of property"), *rev'd on other grounds*, 276 U.S. 547 (1928) *and Schaible v. Fairbanks Medical & Surgical Clinic, Inc.*, 531 P.2d 1252, 1260 (Alaska 1975) (conventional definition of "title" is ownership of the premises) *with Shingleton v. State*, 133 S.E.2d 183, 189 (N.C. 1963) ( "title" signifies actual or constructive possession of property or the right to possession) *and East Norriton Medical Assocs., Ltd. v. Commonwealth*, 650 A.2d 1169, 1171 (Pa. Commw. Ct. 1994) (cites statute which defines "title" as a possessory or leasehold interest). However, it is generally accepted that "title" signifies at least some sort of possessory interest in property and does not include lesser interests such as easements. *See Kohl Indus. Park Co. v. County of Rockland*, 710 F.2d 895, 903 (2d Cir. 1983).

Neither the navigational servitude nor reserved water rights are possessory interests in a body of water. The navigational servitude has been described as a "dominant servitude" and as a "superior navigation easement." *Virginia Elec. & Power*, 365 U.S. at 627. Reserved water rights give the federal government the right to prevent others from appropriating water or to use a certain volume of water, not to possess a body of water. *See Cappaert*, 426 U.S. at 135, 143; *Arizona*, 373 U.S. at 600-01. Therefore, the United States cannot hold title to the navigational servitude or reserved water rights.

A similar conclusion was reached by a New York court when New York State claimed that it had title to submerged lands by virtue of state interests analogous to the federal navigational servitude and federal reserved water rights. In *Niagara Falls Power Co. v. Water Power &*

*Control Commission*, 262 N.Y.S. 217, 219-221 (N.Y. App. 1932), *rev'd on other grounds*, 196 N.E. 51 (N.Y.), *cert. denied*, 296 U.S. 609 (1935), an issue relevant to determining the amount of rent the state could charge for a water power site located on submerged lands which had been previously granted to a private company was whether "title" to the "water power sites or lands" was "vested in the state." The state argued that it had "title" through "[i]ts sovereignty and incidental control over navigable waters," a power similar to the federal navigational servitude, or through interference the power site could cause with state riparian rights appurtenant to a state park, an interest similar to federal reserved water rights. *Id.* at 221. The court rejected these arguments, explaining that these "inchoate and incorporeal" rights did not constitute "title." *Id.* at 224-25.

Our conclusion that the navigational servitude and reserved water rights are not interests to which the United States holds title may raise the question of what Congress intended when it included "interests" in "lands" or "waters," "the title to which is in the United States," within ANILCA's definition of "public lands." *See* ANILCA §§ 102(1)-(3), 16 U.S.C. §§ 3102(1)-(3). A logical answer is that the word "interests" was intended to cover possessory interests lesser than fee interests such as leases, as there is considerable authority that title can be held to such interests. *See, e.g., Shingleton*, 133 S.E.2d at 189; *East Norriton*, 650 A.2d at 1171.

A broader reading would conflict with the clear statement doctrine, which is the third ground underlying our ruling on the navigable waters issue. The clear statement doctrine "counsels that a . . . court should not apply a

federal statute to an area of traditional state concern unless Congress has articulated its desire in clear and definite language to alter the delicate balance between state and federal power by application of the statute to that area." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 954 F.2d 485, 495 n. 6 (8th Cir.) (quoting *Taffet v. Southern Co.*, 930 F.2d 847, 851 (11th Cir.1991), *vacated on other grounds and reh'g granted*, 958 F.2d 1514 (11th Cir.), *on reh'g en banc*, 967 F.2d 1483 (11th Cir.), *cert. denied*, 113 S.Ct. 657 (1992)), *cert. denied*, 504 U.S. 957 (1992). The doctrine means that "[i]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' " *California State Bd. of Optometry v. Federal Trade Comm'n*, 910 F.2d 976, 981 (D.C.Cir. 1990) (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989)); *see also BFP v. Resolution Trust Corp.*, 114 S.Ct. 1757, 1764-66 (1994). The doctrine applies "in circumstances in which the language of a statute or its legislative history provide some indication of ambiguity." *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1306 (2d Cir.1990).

In this case, ANILCA's definition of "public lands" would have to be viewed as ambiguous before it could be interpreted as covering the navigational servitude or reserved water rights Defining "public lands" as waters subject to the navigational servitude or reserved water rights would allow the federal government to regulate hunting and fishing in navigable waters. States have traditionally had the power to govern hunting and fishing in their navigable waters. Regulation of hunting and fishing is a traditional concern of the states. *See Coffee*, 556 P.2d at

1194; *Danielson*, 427 P.2d at 691. Congress has not expressed in unmistakably clear language a desire to alter this traditional allocation of state and federal power.

The fourth basis for our decision on this matter is that, even assuming the navigational servitude or reserved water rights are interests to which the United States holds title, the land management authority which the federal government obtains through these interests is limited by the purposes of the interests. The power any easement, servitude, or similar property interest gives to its holder is limited by the interest's purpose. *See, e.g., Southern Pac. Co. v. City of San Francisco*, 396 P.2d 383, 386 (Cal. 1964); *Benno v. Central Lake County Joint Action Water Agency*, 609 N.E.2d 1056, 1060 (Ill. App.), *appeal denied*, 616 N.E.2d 331 (Ill. 1993). For example, an easement giving a person the right to cross over another's property for access to his own land does not create a right to use the property subject to the easement for any other purpose.

Likewise, the navigational servitude only gives the United States the power to regulate navigable waters for navigation purposes without owing compensation, *Boone*, 944 F.2d at 1493-94; it does not permit federal regulation of hunting and fishing in navigable waters. Similarly, the reserved water rights doctrine only grants to the government the right to either exclude others from appropriating water which feeds a government reservation or to use a limited volume of water in order to serve the federal land reserved. *See Cappaert*, 426 U.S. at 135, 143; *Arizona*, 373 U.S. at 600-01. The doctrine does not provide the federal government with plenary power over a body of water.

Fifth, neither the navigational servitude power to regulate for navigation purposes nor the power to reserve water rights can grant the federal government jurisdiction to manage hunting and fishing in navigable waters. The two powers are over navigation and water, not fish and game.

The final reason for our ruling on the navigable waters issue concerns reserved water rights only. Employing the reserved water rights doctrine to define the geographic scope of navigable waters covered by ANILCA would be highly impractical, perhaps even impossible. It would first require the federal agencies administering ANILCA to determine the primary purpose of each federal land reservation in Alaska at the time the reservation was created. *See New Mexico*, 438 U.S. at 702, 713-15. Then, the federal agencies would have to ascertain the amount of water necessary to fulfill the primary purpose of the reservation. *See Cappaert*, 426 U.S. at 141. Afterwards, the agencies would have to somehow convert that amount of water into a surface area of water constituting "public lands" under ANILCA. This last step could be especially difficult, because reserved water rights represent the right to use a set volume of water or to prevent others from appropriating water, and not specific geographic areas around which property lines may be drawn. Congress could not have intended to create such a complicated and uncertain regulatory scheme.

Despite acknowledging that it was "impos[ing] an extraordinary administrative burden on federal agencies," the Ninth Circuit held in *Katie John* that reserved water rights are interests in land to which the federal government has title for ANILCA purposes. 54 F.3d at

554. The court's holding was based on two grounds. First, the court believed that the position taken by the federal agencies that reserved water rights do define the scope of ANILCA was a reasonable agency interpretation owed deference. *See id.* at 552-54. Second, the court feared undermining Congress' intent to protect subsistence fishing. *See id.* at 552, 554. In our view, neither of these considerations justifies the court's holding.

We apply federal law on deference in determining whether deference is owed to a federal agency's legal position. Under federal deference law, the *Katie John* court should not have deferred to the federal agencies' position on the meaning of ANILCA's definition of "public lands." *See id.* at 554. This position was first adopted by the federal government at oral argument before the district court. *Id.* at 552. Prior to that, the federal regulations promulgated pursuant to ANILCA and the explanations of those regulations had repeatedly generally excluded navigable waters from the definition of "public lands." *See* 36 C.F.R. § 242.3(b) (1994); 57 Fed.Reg. 22,940, 22,941 (1992); 56 Fed.Reg. 29,310, 29,311 (1991); 55 Fed.Reg. 27,114, 27,115 (1990).[6]

The federal government's new position that ANILCA covers navigable waters in which the United States has reserved water rights is a position taken during litigation, not a regulation or agency interpretation that is owed deference. The federal government's new position has not

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[6] Certain navigable waters over submerged lands to which the United States holds title were included in the definition of "public lands." *See* 36 C.F.R. 242.3(b); 57 Fed.Reg. 22,940, 22,941 (1992).

been formalized in any regulation. *See* 60 Fed.Reg. 31,542, 31,542-43 (1995). Positions on interpretations of statutes adopted by agencies during litigation which contradict earlier regulations are not owed deference by courts. *See Wolpaw v. Commissioner*, 47 F.3d 787, 790 (6th Cir.1995) (position announced by federal agency in the course of litigation owed no deference). If any interpretation is owed deference, it is the interpretation in the federal regulations that ANILCA generally does not apply to navigable waters, not the position adopted in a litigation context. *See id.* (while litigation position not owed deference, agency's earlier regulations may be entitled to some deference); *see also General Elec. Co. v. Gilbert*, 429 U.S. 125, 142-46 (1976) (Court refuses to defer to agency interpretation contradicting previous, long-standing interpretation and follows earlier interpretation).

Deference is not due to the new federal position for several other reasons. The definition of "public lands" under ANILCA is a pure question of statutory construction. *See Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 445-46 (1987) (suggesting that no deference or lesser degree of deference is due to agency interpretation if issue before court is pure question of statutory construction). The issue involves no technical agency expertise. *See Thomas Jefferson Univ. v. Shalala*, 114 S.Ct. 2381, 2387 (1994) (deference more warranted when interpretation involves technical agency expertise). The federal agencies' position is not a long-standing one. *See Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 646 n. 34 (1986) (if agency interpretation is neither consistent nor

longstanding, the degree of deference it deserves is substantially diminished). Most importantly, the recent federal interpretation is not a reasonable, permissible construction of ANILCA, for the numerous reasons given earlier. *See National R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 418 (1992) ("a reviewing court need not accept an interpretation which is unreasonable"); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (deference may be given to agency interpretation only if it is based on permissible construction of statute).

We also respectfully disagree with the conclusion of the court in *Katie John* that utilizing reserved water rights to define the scope of ANILCA is necessary to fulfill Congress' intent to protect subsistence fishing. The court noted that Congress intended ANILCA to protect subsistence uses, that subsistence uses include subsistence fishing, and that subsistence fishing has traditionally taken place in navigable waters. 54 F.3d at 552. The court then stated, "Thus, we have no doubt that Congress intended that public lands include at least some navigable waters." *Id.* The court later stated that ruling that neither the navigational servitude nor reserved water rights constitute interests to which the United States holds title for ANILCA purposes "would undermine congressional intent to protect and provide the opportunity for subsistence fishing." *Id.* at 554.

However, the definition of "public lands" in the federal regulations issued pursuant to ANILCA does include navigable waters over submerged lands owned by the United States. *See* 36 C.F.R. § 242.3(b); 57 Fed.Reg. 22,940,

22,941 (1992).[7] Moreover, some subsistence fishing takes place in non-navigable waters which are "public lands." *See, e.g., Quinhagak,* 35 F.3d at 391. Therefore, fulfilling Congress' intent to provide an opportunity for subsistence fishing does not require ruling that reserved water rights define "public lands" under ANILCA.

Because the Submerged Lands Act of 1953 specifically gives states authority over fish and animals in navigable waters and precludes the navigational servitude or reserved water rights from being used to erode that authority, because the navigational servitude and reserved water rights are not interests to which title can be held, because of the clear statement doctrine, because the navigational servitude and reserved water rights are limited interests which do not give the federal government power over navigable or reserved waters unrelated to those interests, and for the other reasons discussed above, we hold that navigable waters are generally not "public lands" under ANILCA. Therefore, ANILCA does not curtail the State's authority to regulate hunting and fishing in navigable waters, and the State has criminal jurisdiction over Totemoff.

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[7] The area encompassed in the regulation defining ANILCA's scope is substantial. It includes, to name only the largest areas, the Arctic Ocean watershed from the Canadian border to Cape Lisbourne on the Chukchi Sea, and virtually all of the Aleutian Islands. *See* 36 C.F.R. § 242.3(b)(1), (4).

## IV. CONCLUSION

We hold that the State has jurisdiction over Totemoff because it has the power to enforce its hunting and fishing laws against subsistence users on federal land, so long as those laws do not conflict with federal laws or regulations. There is no such conflict in this case, since there is no federal right to employ customary means and methods of taking. We further hold that the State has jurisdiction over Totemoff because he violated Alaska law in navigable waters above state lands and ANILCA does not give the federal government the power to regulate subsistence hunting and fishing in such navigable waters.

We REVERSE the decision of the court of appeals that Eluska bars Totemoff from challenging the spotlighting regulation. Alaska Statute 16.05.259 also does not stop Totemoff from contesting the regulation. We hold that the regulation is invalid under *Morry* only if the Board failed to comply with the requirements of AS 44.62.180-.290. *Morry* does not impose a substantive hearing requirement on the Board not contained in the APA.

We REMAND this case to the district court for development of the record relevant to Totemoff's procedural challenge to the spotlighting ban. If Totemoff demonstrates that the Board did not comply with the requirements of AS 44.62.180-.290 when it passed 5 AAC 92.001 or 5 AAC 92.080(7), the district court should vacate Totemoff's conviction and dismiss the charges against him. Otherwise, the conviction is to stand.

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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|---|---|
| STATE OF ALASKA,<br>Plaintiff-Appellant,<br>v.<br>BRUCE BABBITT, Secretary of the Interior, et al.,<br>Defendants-Appellees. | No. 94-35480<br>D.C. No. CV-92-00264-HRH |
| KATIE JOHN, et al.,<br>Plaintiffs-Appellees,<br>v.<br>UNITED STATES OF AMERICA, et al.,<br>Defendants-Appellants. | No. 94-35481<br>D.C. No. CV-90-00484-HRH<br>ORDER<br>(Filed Aug. 8, 1995) |

Before: WRIGHT, HALL and WIGGINS, Circuit Judges.

The panel has voted to deny the petition for rehearing, and Judges Hall and Wiggins have voted to reject the suggestion for a rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is **DENIED** and the suggestion for a rehearing en banc is **REJECTED.**

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

October 26, 1995

Ms. Joanne M. Grace
Assistant Attorney General
1031 W. 4th Avenue
Anchorage, AK 99501

Re: Alaska
v. Bruce Babbitt, Secretary of the Interior, et al.
Application No. A-372

Dear Ms. Grace:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on October 26, 1995, extended the time to and including December 6, 1995.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Melissa A. Blalock
Melissa A. Blalock
Assistant Clerk

Robert T. Anderson
Lawrence A. Aschenbrenner
Bart K. Garber
NATIVE AMERICAN RIGHTS FUND
310 K Street, Suite 708
Anchorage, Alaska 99501
Attorneys for Plaintiffs
(907) 276-0680

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

KATIE JOHN, DORIS CHARLES AND MENTASTA VILLAGE COUNCIL,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA, MANUEL LUJAN, in his official capacity as Secretary of the United States Department of the Interior and CLAYTON K. YEUTTER, in his official capacity as Secretary of Agriculture, CARL ROSIER, in his official capacity as the Commissioner of the Alaska Department of Fish and Game and the STATE OF ALASKA,

Defendants.

No. A90-484 CIV

**FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

1. Plaintiffs bring this action pursuant to section 807 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3117. The Court's jurisdiction is also invoked pursuant to 28 U.S.C. § 1331 and through 28 U.S.C. § 1362. Venue properly lies in the District of Alaska under 28

* * *

Fourth Cause of Action

28. Paragraphs 1-19 are hereby incorporated by reference.

29. The state of Alaska has no jurisdiction over the waters of the Copper River and Tanada Creek since such waters constitute "public lands" as defined by ANILCA. As to any part of the Copper River system, Tanada Creek, or the Gulf of Alaska which do not constitute public lands, the state is preempted from regulating fisheries under its jurisdiction which in any way infringes on, or adversely affects in any way, plaintiffs' opportunity to fish for subsistence at Batzulnetas.

PRAYER FOR RELIEF

Wherefore, plaintiffs request the Court to:

(a) issue a declaratory judgment that waters of Tanada Creek and the Copper River are "public lands" as defined by ANILCA;

(b) issue a declaratory judgment that the federal defendants' refusal to provide for a non-wasteful subsistence fishery at Batzulnetas is a restriction of a subsistence use contrary to Title VIII of ANILCA;

(c) issue a declaratory judgment that the federal defendants' refusal to provide for a fishery at Batzulnetas is unlawful due to a conflict with the Alaska Native Allotment Act of 1906

(d) issue a declaratory judgment that the federal defendants' policy of refusing to allow deviations and modifications to the Batzulnetas trail is unlawful;

(e) order the federal defendants to promulgate a regulation providing for a subsistence fishery at Batzulnetas and declare that such defendants have a duty to preclude the state defendants from taking any action on non-public lands which interferes with plaintiffs' harvest opportunities on public lands;

(f) declare that defendants State of Alaska and Rosier have no jurisdiction over the waters of the Copper River system, including the Copper River and Tanada Creek, which constitute "public lands" and that such defendants are prohibited from taking any action on non-public lands which in any way interferes with the plaintiffs' rights on "public lands" and enjoin such defendants from taking any such action;

(g) award plaintiffs the costs of this action and reasonable attorney's fees;

(h) award plaintiffs such other relief as may be reasonable and necessary.

RESPECTFULLY SUBMITTED,

DATED: March 18, 1991 By: /s/ Robert T. Anderson
Robert T. Anderson
of Attorneys for
Plaintiffs

# COMPARATIVE HISTORY OF FEDERAL AND STATE MANAGEMENT OF FISHERIES IN ALASKA

Prepared by Ron Regnart

Alaska Department of Fish and Game
ANILCA Program Office
Anchorage, Alaska

June 1993

* * *

In spite of the long history of bad feelings associated with management of Alaska's fishery, the transfer of regulatory authority over fisheries was accomplished smoothly. The territorial Department of Fisheries, in existence since 1949, had established it competence, and its much greater public acceptance made this task easier (Crutchfield et al. 1969 p. 103).

## State Management of Fisheries

### Description of Fisheries

During the first fifteen years of state management, salmon harvests remained at relatively low levels (Figure 1). Some improvement was noted in runs and harvests during the 1960s due to better management practices, some of which were initiated by federal managers in the late 1950s. Extremely poor environmental conditions resulted in very small returns to some areas during 1967 and 1972 through 1975 (Pennoyer 1978 p. 24; University of Alaska 1972 p. 302). This resulted in the adoption of severe fishery restrictions to insure achievement of optimal spawning escapements. Management improvements initiated by the state began paying off after 1975 when

annual salmon harvests began increasing. The annual salmon harvest has averaged 116 million fish since 1975 and 133 million fish since 1980. Since 1980, the record harvest (126 million) made under federal control has been exceeded during eight years. A record harvest of 187 million salmon occurred in 1991 (Figure 1).

The Alaskan seafood industry has expanded greatly and is much more diversified compared to the pre-statehood era. Due to a gradual decline in the market demand for canned salmon, there has been a steady increase in the production of fresh and fresh-frozen salmon. Records maintained by the state show that fresh and fresh-frozen salmon currently comprise approximately 65 percent of the total salmon production. Many salmon, herring, and shellfish fisheries have been expanded, and new ones have been developed without compromising conservation requirements. The state has recently adopted regulations and special management guidelines encouraging careful development of shellfish mariculture and new fisheries for sea urchins and sea cucumbers (Pennoyer 1978 p. 24; Holland et al. 1992 pp. 97-100; ADF&G 1992a. p. 24).

Although Seattle remains the financial center for the seafood industry, participation by Alaskan residents in the industry has increased substantially in contrast to the period of federal control when nonresidents dominated all facets of the industry. For example, of the 40,000 employees engaged in fish harvesting and processing combined in 1984, 60 percent were Alaskan residents. Alaska residents purchased 84 percent of all commercial fishing permits in 1986 (Kruse 1988 pp. 10-11).

The sport fish harvest survey indicated 425,025 anglers harvested 3.3 million fish (31 percent sea-run salmon) in 1991. Since 1981, estimated number of anglers fishing in Alaska has increased 39 percent (Mills 1992 pp. 4-6). Although comprehensive studies of eccnomic impacts of sport fishing are lacking, available information indicates that these impacts are substantial and increasing each year. Recent estimates of expenditures associated with sport fishing are only available for Southcentral Alaska and the Juneau area. Angler expenditures in Southcentral Alaska and the Juneau area were approximately $127 million and $14 million, respectively. These expenditures resulted in approximately $72 million in personal income and directly supported 2,360 sport fishing related jobs (Kruse 1988 p. x).

Not only are the fishery resources generally in better condition under state management, the diversified seafood industry is more economically important to a greater number of people. The seafood industry is Alaska's largest private sector employer and, besides oil and gas, provides the greatest contribution of any natural resource to the state's treasury. Alaska's commercial fishery (all species) supports the highest level of production in the United States, over five times that of the next ranked states, and about one-half of the nation's total production. In 1991, commercial fishermen in Alaska were paid $1.3 billion (39% groundfish, 25% salmon, 26% shellfish, 10% others) for their catch, which after processing, provided over $2.5 billion of fishery products at their first wholesale value (ADF&G 1992 a. p. 1).

* * *

*COMMERCIAL FISHERIES ANNOUNCEMENT*

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[seal] [seal]

January 26, 1995

NEWS RELEASE

PRINCE WILLIAM SOUND HERRING

The projected 1995 herring spawning biomass for Prince William Sound is 19,000 tons. The biological spawning threshold is 22,000 tons. Based on the biomass projection the commercial spring herring fisheries will not open, to conserve the stock for rebuilding.

The herring biomass has declined by over 75 percent from the record biomass in 1992 of over 100,000 tons. This precipitous decline was first observed in the spring of 1993, and low stock abundance continued during 1994.

Several stock assessment methods are used and all indicate that herring are at low abundance.

## RECENT PRINCE WILLIAM SOUND HERRING BIOMASS INDICES

| | PEAK AERIAL SURVEY (tons) | SPAWN DEPOSITION (tons) | FALL HYDRO-ACOUSTIC (tons) | MILES OF SPAWN |
|---|---|---|---|---|
| 1992 | 53,845 | 128,263 | NO SURVEY | 74.7 |
| 1993 | 20,725 | NO SURVEY | 20,000 | 20.4 |
| 1994 | 20,000 | 17,069 | BELOW THRESHOLD | 14.6 |

The spring biomass is expected to be 49 percent age-7 and 24 percent age-5. Given the age structure it is unlikely that there will be an increase in biomass in 1995 unless there is a large recruitment. If significant recruitment does not occur the stock could further decline.

State and Federal agencies and the Prince William Sound Science Center will continue stock monitoring during the spring of 1995. Monitoring projects include aerial surveys, spawn deposition, hydroacoustics, egg incubation and egg loss, avian predation, reproductive impairment and disease.

No. 95-1084

Supreme Court, U.S.
FILED
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In The

# Supreme Court of the United States

October Term, 1995

STATE OF ALASKA,

*Petitioner,*

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, et al.,

*Respondents,*

v.

KATIE JOHN, et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF AMICI CURIAE STATES OF IDAHO, CALIFORNIA, COLORADO, NEVADA, UTAH AND WYOMING IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The Questions presented are:

Whether the existence of a reserved water right expands the boundaries of federal "public land" as defined in boilerplate language found throughout Title 16 of the United States Code.

Whether the existence of a reserved water right permits federal usurpation of an area traditionally reserved to the states – control of fish harvests in what normally are state waters.

Whether the court of appeals erred in failing to apply the "clear statement" rule to analyze federal preemption of traditional state authority.

Whether the court of appeals erred in analyzing the provisions of the Alaska National Interest Lands Conservation Act, 16 U.S.C. 3101 *et seq.*, by using a *Chevron* analysis where there were no agency rules or regulations preempting state authority and by granting deference instead to the agencies' litigation position.

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Idaho, California, Colorado, Utah, Nevada, and Wyoming file this brief, Amici Curiae, pursuant to Rule 37.2 of the Supreme Court Rules, in support of the petition of the State of Alaska for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

On its surface, this case appears to concern only the geographic scope of a preference to hunt and fish for subsistence purposes granted exclusively to rural Alaskan residents[1] by Congress in Title VIII of the Alaska National Interest Lands Conservation Act ("ANILCA"), Public Law 96-487, 94 Stat., 2374 (1980), 16 U.S.C. § 3101 *et seq.* By statute, this preference only applies within the federal "public lands" found in Alaska and, thus, would not appear to affect other states. However, directly at issue in that decision is the scope of the "implied reservation of water rights" doctrine – a doctrine of vital significance to western states.

The court of appeals' decision, if allowed to stand, would broaden the objective of the judicially created reserved water rights doctrine. It relies on the mere existence of a reserved water right to expand federal "public land" boundaries and thus authorizes federal usurpation of an area traditionally reserved to the states – control of fish harvests in what normally are state waters. The decision broadly implicates state-federal sovereign relations and promises to upset the traditional balance. Finally, it creates a precedent that seriously

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[1] While the dissent states that this preference is granted only to Alaskan Natives, the dissent is wrong. This preference is granted to all *rural* residents – both Native and non-Native. Native and non-Native Alaskans who live in urban areas were not granted this preference.

violates traditional rules of statutory construction specifically adopted by this Court to preserve that delicate state-federal balance.

The precise question decided by the court of appeals that is the subject of the State of Alaska's Petition is whether the term "public lands" as defined in ANILCA includes navigable waters of Alaska in which the United States now claims an interest by virtue of the reserved water rights doctrine.[2] By ruling that the definition of "public lands" includes all waters in which a federal reserved water right exists, the court of appeals authorized a potentially massive federal intrusion into an area traditionally regulated by the State of Alaska. Because that definition is boilerplate language found in statutes throughout Title 16 of the United States Code, this ruling implicitly threatens western states in which federal reserved water rights have been recognized – expanding the reach of those statutes into state waters.

The decision ignores the firmly established doctrine of clear intent in statutory construction and mis-interprets the federal reserved water rights doctrine as defining the boundaries of federal public land. Rather than applying the "clear statement" rule required by principles of federalism and by this Court, the court of appeals analyzed the statute using a *Chevron*[3] analysis, improperly granting deference to the agencies' newly adopted *litigation* position.[4]

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[2] The court of appeals correctly rejected arguments that the existence of navigational servitude created "public lands."

[3] *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[4] Even the application of *Chevron* was improper because the United States' position was wholly unsupported by regulations,

Two aspects of the court of appeals' decision are particularly troubling to the Amici: (1) the method the court of appeals adopted to analyze federal preemption of traditional state authority abrogates the "clear statement" rule; and (2) its unprecedented holding that the court created reserved water rights doctrine can be employed to expand public land boundaries ignores the limited construction such rights are given.

## INTEREST OF AMICI IDAHO, CALIFORNIA, COLORADO, NEVADA, UTAH AND WYOMING

Like other western states, each Amici state contains within its borders vast areas of federal lands reserved from the public domain that are potentially subject to an assertion of a federal reserved water right.[5] The court of appeals' decision is particularly disturbing to the Amici, because this is the first court decision that holds that an implied federal reserved water right provides the framework for usurping a state's traditional authority to regulate fishing in state waters – not because the reserved right is *necessary* to effectuate the primary purposes of the federal reservation but because its mere potential[6]

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rulings or administrative practice. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-213 (1988).

[5] For example, in Idaho, thousands of claimed federal reserved water rights are being adjudicated in a general stream adjudication brought pursuant to the McCarran Act, 43 U.S.C. § 666. *In Re Snake River Basin Adjudication*, Case No. 39576, District Court of the Fifth Judicial District of the State of Idaho.

[6] No federal reserved water rights have ever been asserted or identified in Alaska. In fact, unlike water in the arid western states, water is so plentiful in Alaska that its former Director of the Water Resources Department of Natural Resources

existence transforms state waters into federal public lands, creating jurisdiction for the agency to assert that authority.

In its ruling, the court of appeals determined the meaning of the phrase used to define "public lands" in ANILCA – "lands, waters and interests therein." This definition of public lands defines the geographic scope of all fifteen titles in ANILCA, not just the scope of Title VIII.[7] In Title VIII, "public lands" ultimately define the balance struck by Congress with respect to the Secretary's authority and the State of Alaska's traditional fish and wildlife management authority on Alaska's navigable waters. However, it is also boilerplate language used in hundreds of statutes collected in Title 16 of the United States Code.[8] Thus, this Court should review the court of

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published a booklet promoting exportation of Alaska's water to southwestern states and later testified before the Nevada Legislature concerning marketing its water. Ric Davidge, Alaska Water Imports: A Discussion Paper of Key Issues Involved in Moving Bulk Quantities of Water from Alaska to the Southwestern States and Mexico Using Marine Transport 3 (July 1993) (on file with State of Alaska Department of Natural Resources); 2 *Water and Water Rights*, § 16.04(c)(9) (1991 ed. & Supp. 1994).

[7] Title VIII which is at issue in this case is only one title out of fifteen (15) titles in ANILCA. Section 102 applies the public lands definition to the entire Act, except Title IX and Title XIV. Title IX implements ANCSA and the Alaska Statehood Act, 72 Stat. 339. Title XIV amends ANCSA and related provisions. In those two titles, the definition of public lands is the same as it is in ANCSA and in the Alaska Statehood Act. *Amoco Production Co. v. Village of Gambell, Alaska*, 107 S. Ct. 1396, 1406 (1987).

[8] *E.g.*, 16 U.S.C. §§ 90, 90B(a), 110c(c)(3), 121, 228b(a), 230a(b), 230g(a), 272(a), 273, 398d(a), 410j, 410o, 410p(a),

appeals' decision determining the meaning of this language. If such boilerplate language satisfies the "clear intent" rule by demonstrating Congressional intent to usurp traditional state regulatory authority to manage fish harvests by its citizens in state waters, this marks an unmistakable and chilling departure from traditional rules of statutory construction with very real implications for each state. This Court should review this departure. Likewise, it virtually transforms the traditional definition of "public lands" with obvious implications for each state.

Like other states, Amici have a significant interest in preserving the "clear intent" doctrine because it requires proponents of an intrusion into an area of traditional state authority to plainly demonstrate Congress' clear and manifest intent to act in that manner. The clear intent doctrine was designed to preserve the delicate state-federal balance in areas where the state has traditionally exercised management or regulatory authority. Management of fish and game, and particularly of fish and game harvests, is traditionally managed by the states.

In this case, the Amici are clearly affected if the Court should allow the court of appeals' decision to stand, because its decision relies on a doctrine of implication (federal reserved water rights) to justify intruding upon an area of traditional state authority. The State of Alaska's Petition should be granted.

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410bb(b)(1), 410ff-1(a), 410gg, 410gg-1(a), 410gg-2(b), 410ii-3(a), 410jj-3(c), 410mm-2(b), 410rr-2, 410rr-7(c), 459d-3(a), 459e-1(a), 459h-1(a), 459i-1, 459j-1, 460l-8(a), 460l-9(a)(1), 460-10a, 460l-10b, 460m-3, 460m-9(a), 460m-16(a), 460p-2(a), 460q-2(a), 460r-2(a), 460v-7, 460z-6(a), 460z-13, 460aa-12, 460bb-3(a), 460cc-1(a), 460ee(c)(1), 460kk(c)(1), 460ww(b).

## REASONS FOR GRANTING THE WRIT

### 1. The Court Of Appeals Ignored The Clear Intent Doctrine And Improperly Relied On *Chevron* To Analyze This Statute

When Congress legislates in an area traditionally regulated by the states, this Court starts with the assumption that the historic police powers of the states are not to be superseded unless that is the clear and manifest purpose of Congress; this is called the "clear intent" doctrine. *E.g., Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476, 2482 (1991). This presumption assures that the federal-state balance "will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Pkg. Co.*, 430 U.S. 519, 525 (1977) *quoting United States v. Bass*, 331 U.S. 218, 230 (1947). The primary issue before the court of appeals in this case was whether Congress intended to assume management of subsistence fish harvests in some navigable waters belonging to the State of Alaska. Those harvests had always been managed by Alaska, just as in-state fish harvests are managed by each Amici state and other states in state waters. The issue, therefore, clearly implicates an area traditionally regulated by the states. The court of appeals should have examined the statutory language to determine whether that intent was clearly manifested and not simply implied.

The court of appeals did not acknowledge this important statutory presumption. Instead, it failed to analyze the issue using the "clear intent" doctrine at all and adopted a *Chevron* analysis in its place, even applying that analysis incorrectly.

> We consider two questions when we review an agency's construction of a statute that it administers. *Chevron U.S.A. v. Natural Resources*

> *Defense Council*, 467 U.S. 837, 842 (1984). First, we consider "whether Congress 'has directly spoken to the precise question at issue' either in the statute itself or in the legislative history." *Railway Labor Executives' Ass'n v. ICC*, 784 F.2d 959, 963 (9th Cir. 1986) (quoting *Chevron*, 467 U.S. at 842). Second, if Congress has not directly spoken to that precise question, we consider "whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

*State of Alaska v. Babbitt*, No. 94-35480, 1995 WL 749795, at *2 (9th Cir. (Alaska) Dec. 19, 1995).

While the court of appeals correctly ruled that Congress *expressed* no intent to usurp traditional state management authority on all navigable waters in Alaska based on either an exercise of its Commerce powers or the navigational servitude, it failed to comprehend the implications of that ruling. In reviewing ANILCA's language and legislative history, the court of appeals correctly ruled it had no clear direction, stating:

> ANILCA itself refers only to "lands, waters, and interests therein, the title to which is in the United States." *It makes no reference to navigable waters. The legislative history is also unhelpful, containing only a single reference to navigable waters.* See 126 Cong. Rec. 20278-80 (Nov. 12, 1980) (statement of Rep. Udall).

*Id.* (Emphasis added.)[9] It never addressed Congress' express recognition of continued state management found in ANILCA.

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[9] Significantly, the court of appeals correctly rejected Representative Udall's statements as having little weight:

> Congressman Morris Udall inserted a statement in the Congressional Record that ANILCA's definition

Congress included an express recognition of state management authority when it wrote:

> (a) Nothing in this Act is intended to enlarge or *diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands* except as *may* be provided in [title VIII of this Act], or to amend the Alaska constitution.
>
> (b) Except as specifically provided otherwise by this Act, nothing in this Act is intended to *enlarge* or diminish the responsibility and authority of the Secretary over the management of the public lands.

16 U.S.C. § 3202. (Emphasis added.) This is an express statement that in enacting ANILCA, Congress intended to build upon legal relationships established by state law, supplanting state law only to the extent actually provided in Title VIII. If the court of appeals had analyzed Title VIII of ANILCA under the correct standard, this recognition by the court of appeals that neither the statutory

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of public lands included all navigable waters throughout Alaska. See 126 Cong. Rec. 29260, 20278-80 (Nov. 12, 1980) (statement of Rep. Udall). He did so, however, after the Senate had passed ANILCA, after the House had finished debating it, and shortly before the House voted on it. His views deserve little weight. *See NLRB v. Fruit & Vegetable Packers & Warehouseman* [sic], 377 U.S. 58, 66 (1964) ("these statements could represent only the personal views of these legislators, since [they] were inserted in the Congressional Record after passage of the Act"). We reject the argument that Congress expressed its intent to exercise its Commerce Clause powers to regulate subsistence fishing in all Alaskan navigable waters.

*Id.*

language nor the legislative history demonstrates Congress' clear intent to usurp traditional state management authority should have ended the inquiry.

However, the court of appeals went on to say, "[l]acking clear direction, we must decide whether the *federal agencies' conclusion* that public lands include some navigable waters under the reserved water rights doctrine is based on a permissible construction of the statute." *Id.* (Emphasis added.) Instead, the court of appeals improperly decided to *defer* to the agencies' *litigation* position where the agencies belatedly decided to rely on the reserved water rights doctrine to expand their authority to manage Alaska's fish in state waters.

### 2. The Court Of Appeals *Chevron* Analysis Was Erroneous

Even the court of appeals' application of *Chevron* was improper because the United States' position was wholly unsupported by regulations, rulings or administrative practice; it was a belatedly adopted litigation position. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-213 (1988). As this Court ruled in *Bowen* where the federal agency contended its litigation position was entitled to deference under *Chevron* and its progeny:

> We have *never* applied the principle of those cases to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice. To the contrary, we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, on the ground that "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands." *Investment Company Institute v. Camp*, 401 U.S. 617, 628, 91 S. Ct. 1091, 1097, 28 L. Ed. 2d 367 (1971);

> *cf. Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S. Ct. 239, 245-246, 9 L. Ed. 2d 207 (1962) ("The courts may not accept appellate counsel's post hoc rationalizations for agency [orders]"). . . . . *Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.* *Id.* at p. 213. (Emphasis added.)

The court of appeals recognized this was a litigation position in its decision and acknowledged that:

> Until the second oral argument before the Federal District Court of Alaska, the federal agencies had consistently maintained that neither the federal reserved water rights doctrine nor the navigational servitude were interests in water, title to which was in the United States, expanding the definition federal public lands under ANILCA.

*Babbitt*, at *2. Neither agency had promulgated rules or regulations extending management onto any navigable waters in Alaska or asserting navigable waters were "public lands." Therefore, the court of appeals' decision is directly contrary to this Court's rulings. An agency's litigation position, unsupported by agency rules or regulations is simply not entitled to deference under the *Chevron* analysis or under any other analysis. This departure from precedent is significant. Therefore, this Court should accept the State of Alaska's Petition.

### 3. The Court Of Appeals' Decision Ignores This Court's Decision That A Reserved Water Right Can Only Be Recognized Where, Without It, The Primary Purposes For The Federal Reservation Would Be Defeated.

The federal reserved water right doctrine is a judicial creation; therefore, this Court has limited its scope. The mere reservation of property by Congress under the Property Clause is not sufficient to establish the existence

of a federal reserved water right. Rather, this Court has consistently recognized that a federal reserved water right can *only* be recognized where the primary purposes for the federal reservation would be *entirely defeated* without the water. *United States v. New Mexico*, 438 U.S. 696, 700 (1978). Determining its existence requires a court to analyze carefully the primary purposes for the reservation *and* to determine the absolute necessity for the reserved water right.

In this case, neither the district court nor the court of appeals had any evidence before them supporting a determination that the primary purposes for the creation of the Wrangell-St. Elias[10] conservation unit was to protect subsistence fishing for rural Alaskans. In fact, it was not; the primary purpose for its creation was for land management. This Court analyzed the same definition section at issue in this case and said:

> *The subsistence-protection provisions of the statute must be viewed in the context of the Act as a whole.* ANILCA's *primary purpose was to complete the allocation of federal lands in the State of Alaska,* a process begun with the Statehood Act in 1958 and continued in 1971 in ANCSA. To this end, it provided for additions to the National Park System, National Wildlife Refuge System, National Forest System, National Wild and Scenic Rivers System, and National Wilderness Preservation System, and also provided for the establishment of a National Conservation Area and National Recreation Area, within the State of Alaska. . . . The Act also provided for a means to facilitate and expedite the conveyance of federal lands within the State to the State of Alaska under the

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[10] The fishing rights asserted in the District Court were located in the Wrangell-St. Elias conservation unit.

> Statehood Act and to Alaska Natives under ANCSA. . . . [T]he same definition of "public lands" which defines the scope of Title VIII applies as well to the rest of the statute. . . .

*Amoco Production v. Gambell*, 480 U.S. 531, 1406-07 (1987) (emphasis added).

Likewise, neither the district court nor the court of appeals had any evidence establishing that the primary purpose of a reservation would be *"entirely defeated"* without the claimed reserved water and made no such finding.

Because a reserved water right intrudes upon an area of traditional state regulation, the federal reserved water rights doctrine is narrowly construed by this Court. A court is required to strictly scrutinize the primary purposes for the reservation in question to define the scope of the reserved water right, if it exists at all, and then the right is recognized in "only that amount of water necessary to fulfill the purposes of the reservation, no more." *Cappaert v. United States*, 426 U.S. 128, 141 (1976). Specifically, the existence of a reserved right depends upon the conclusion that the purpose of the reservation would be *entirely defeated without the claimed water*. *New Mexico*, 438 U.S. at 700 (1978); *United States v. Jesse*, 744 P.2d 491, 494 (Colo. 1987). In *New Mexico*, Chief Justice Rehnquist wrote that:

> Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be *entirely defeated*.

*New Mexico*, 438 U.S. at 700 (1978) (emphasis added). This careful examination is required both because the reservation is implied, rather than express, and because Congress continues to defer to state water law in the field of federal-state jurisdiction over water allocation. *Id.* at 702-03.

Implicit in the necessity requirement is that a reservation alone is not sufficient. Indeed, the United States Forest Service recently argued to the Court of Appeals for the Tenth Circuit that where it could promote the primary purposes for the reservation *without* the assertion of a reserved water right, it would not assert the right.

> The Forest Service argues that it has numerous other ways to protect wilderness water values in addition to seeking federal reserved water rights under the Wilderness Act. It has provided a list of these other methods and an examination of possible threats to wilderness water values. See second report, at 10-19.

*Sierra Club v. Yeutter*, 911 F.2d 1405, 1412 (10th Cir. 1990). The Tenth Circuit accepted this position, rejecting the Sierra Club's argument that the Forest Service had a duty to assert a reserved water right. The Amici agree with both the Tenth Circuit and with the United States Forest Service. The court of appeals' decision in this case, however, would essentially nullify this Court's requirement that necessity be established before the reserved water right can be recognized.

Amici are directly affected by a ruling that ignores this Court's requirement for necessity and thus urge Alaska's Petition be accepted.

**4. The Court Of Appeals' Decision Fundamentally Changes The Traditional Notion Of A Federal Reserved Water Right.**

The court of appeals found that a federal reserved water right was an "interest in water" such that it defined the geographic scope of "public lands." Based on this conclusion, the court of appeals determined that Congress intended to expand federal authority to manage fish in navigable waters within Alaska. This determination fundamentally changes the traditional notion of a federal reserved water right. The federal reserved water right does not define geographic boundaries. It is not a land management tool nor the justification for managing fish. It is a usufruct – the right to use water only – it is not a right to possess the water column.

The holder of a non-consumptive water right is not entitled to withdraw water from the stream for consumptive purposes; rather the water right is simply intended to prevent other appropriators from depleting the waters below a protected level in any area in which the non-consumptive right applies. *United States v. Adair*, 723 F.2d 1394, 1411 (9th Cir. 1984), *cert. denied*, 467 U.S. 1252 (1984). Thus, while a federal instream flow right may be a property interest, it is more similar to a negative easement and is clearly not akin to title. Rather, the United States is merely asserting the right to exclude others, junior in time, from appropriating that flow.

The court of appeals ruled that by virtue of the federal reserved water rights doctrine, all waters appurtenant to federally reserved or withdrawn lands are "public lands" where that water right exists. The court of appeals confuses a right to use water with ownership of the water column. Given the nature of the reserved waters doctrine, it is inconceivable that Congress

intended to employ it as a geographic delineator of public land boundaries. The reserved waters doctrine certainly may involve the right to use the waters of a navigable stream, yet the water column itself, the corpus of a navigable stream, never becomes, or in the nature of things, *can become* the subject of fixed appropriation or exclusive dominion. "Neither sovereign nor subject can acquire anything more than a mere usufructuary right therein." *Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 247 n.10 (1954).

Therefore, because the court of appeals' decision threatens to fundamentally alter the effect of a reserved water right, clearly affecting all western states, Amici urge the Court to review this decision and to narrowly construe the nature and effect of a reserved water right.

### 5. The Court Of Appeals Overlooked The Requirement That Title To The Interest Is Necessary To Invoke ANILCA's Definition Of "Public Lands."

The central issue before the court of appeals was whether "public lands" as defined in § 102 of ANILCA includes those waters in Alaska subject to an unasserted federal reserved water right. 16 U.S.C. § 3102. Contrary to the court of appeals' decision, essential to that determination is whether the United States has "title" to an interest in waters by virtue of the reserved water right. The "public lands" definition is central to any analysis. "Public lands" are defined in ANILCA § 102 as follows:

> (1) The term "land" means lands, water and interests therein.
>
> (2) The term "Federal land" means lands the title to which is in the United States after December 2, 1980.

> (3) The term "public lands" means land situated in Alaska which, after December 2, 1980 are Federal lands, except –
>
> (A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;
>
> (B) land selections of a Native Corporation made under the Alaska Native Claims Settlement Act . . . which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and
>
> (C) lands referred to in section 19(b) of the Alaska Native Claims Settlement Act. . . .

16 U.S.C. § 3102(1)-(3) (citations omitted).

Although it recognized the significance of "title" when it analyzed the public lands definition against the navigational servitude,[11] the court of appeals failed to

---

[11] The court of appeals wrote:

> We have held that the navigational servitude is not "public land" within the meaning of ANILCA because the United States *does not hold title to it. City of Angoon v. Hodel*, 803 F.2d 1016, 1027 n.6 (9th Cir. 1986), *cert. denied*, 484 U.S. 870 (1987). Contrary to the district court's opinion, the Supreme Court has not limited that holding. In *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987), the Court rejected the assertion that the Outer Continental Shelf (OCS) is not "Federal land" because the United States does not

even examine it in the context of the federal reserved water right to determine if it amounted to a titled interest in water. Instead, it misconstrued this section to mean that simply having a property interest is sufficient to make a land or water a public land for ANILCA purposes. It recognized its own difficulty in its conclusion where it stated:

> If we were to adopt the state's position, that public lands exclude navigable waters, we would give *meaning to the term "title" in the definition of the phrase "public lands."* But we would undermine congressional intent to protect and provide the opportunity for subsistence fishing.

*Babbitt*, at *5. It is wrong. Title is essential to Congress' definition in this context.

### A. This Court Has Affirmed That The Public Lands Definition In ANILCA Requires The Existence Of Title Interest

The court of appeals missed the issue. It is not whether there exists a property interest but whether that

---

hold title to it. *Id.* at 548 n.15. The Court explained in dictum that, while the United States may not hold "title" to the OCS, it was hesitant to conclude that the United States did not have "title" to "any interests therein." *Id.* But its dictum indicates only that, while the United States may not hold title to land, it may hold title to interests (e.g., mineral rights) in that land. For this reason, we reject the argument that the navigational servitude is an "interest . . . the title to which is in the United States," such that all navigable waters are public lands within the meaning of ANILCA.

*Babbitt*, at *4 (emphasis added).

property interest amounts to "title." There are many property interests which fall short of title interests such as usufructuary rights, negative easements, or restrictive covenants. The federal reserved water right is one such right.

As both this Court and even the court of appeals have held, "public lands" are defined in ANILCA to be lands, waters and interests therein, situated in Alaska, the *title* to which is in the United States after the date of enactment of ANILCA. *Amoco Production v. Gambell*, 480 U.S. 531 (1987); *City of Angoon v. Hodel*, 803 F.2d 1016, 1027 n.6 (9th Cir. 1986), *cert. denied*, 484 U.S. 870 (1987). Because Congress explicitly tied the definition of public lands to title and this Court has recognized this link; title is an essential element of this definition. Thus, the court of appeals' failure to analyze the type of interest created when a federal reserved water right is recognized and whether it amounts to "title" is fatal to its analysis.

### B. Federal Reserved Water Rights Are Not Title Interests

In this context, the United States clearly does not have title to any federal reserved water rights. Whether it is a property interest is ultimately irrelevant. While the United States acquires a vested right to use water upon establishment of a federal reserved water right, it does not have title to the water column. In fact, in this case, the United States never actually affirmatively asserted it has "title" to the water right, and even at oral argument specifically conceded it did *not* have title and stated as follows:

> It is clear that the federal reserve water rights is a – and reserve rights generally are an interest in property to which a party is entitled. While

> there technically is *not a title interest, it is a use interest,* it is still a matter of property interest.

Transcript of Proceedings, Oral Argument on Cross-Motions for Summary Judgment, March 18, 1994; p. 36. The United States calls the right a property right but never suggested it had "title" to the right.

"Title" is defined in *Black's Law Dictionary* 1331 (5th Ed. 1979) as follows:

> Title is the means whereby the owner of lands has just possession of his property. The union of all elements which constitute ownership. Full independent and fee ownership. The right to or ownership in land, also the evidence of such ownership.

"Interest" is defined in *Black's Law Dictionary* at 729 as something "less than title."

No federal or state case describing the federal reserved water rights doctrine has ever suggested that the United States has "title" to the water of a stream.

The statutory context is also important. "Land" is defined in more general terms, encompassing "interests." 16 U.S.C. § 3102(1). When Congress defined the narrower term, "federal lands," Congress further modified it by using "title." 16 U.S.C. § 3102(2). Congress did not say that federal lands are "lands to which the United States hold an interest." It provided that "federal land means lands the *title* to which is in the United States. . . . " 16 U.S.C. § 3102(2). Congress was careful that in creating federal duties and responsibilities, these duties be limited to avoid encroaching on the authority of the State of Alaska over non-federal lands. *See* 16 U.S.C. §§ 3202(a), (b).

The court of appeals is, therefore, wrong. The "title" requirement is not superficial; it has meaning. Congress knew very well what it was doing and meant what it said

– "title" modifies "interest." When Congress includes particular language in one section of a statute but does not use the same language in another, this Court presumes it acted intentionally. *Rodriguez v. United States*, 480 U.S. 522, 525 (1987). The differences are not ascribed to simple mistake or inadvertence. *Russello v. United States*, 646 U.S. 16, 23 (1983).

Therefore, the statute, its structure, and the case law demonstrate that title and interests are not synonymous. The United States must establish its title to the water column. It cannot do so, and this Court should accept the State of Alaska's Petition.

## CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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No. 95-1084

In The

# Supreme Court of the United States

October Term, 1995

STATE OF ALASKA,

*Petitioner,*

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.,

*Respondents,*

v.

KATIE JOHN, ET AL.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF AMICI CURIAE STATES OF ARIZONA, HAWAII, MONTANA, NORTH DAKOTA and SOUTH DAKOTA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## INTRODUCTION

Come now the States of Arizona, Hawaii, Montana, North Dakota and South Dakota, through their Attorneys General, and file this brief Amici Curiae, pursuant to Rule 37.2 and .5 of the Supreme Court Rules, in support of the petition of the State of Alaska for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

This case involves the geographic scope of the preference to hunt and fish for subsistence purposes established by Congress in Title VIII of the Alaska National Interest Lands Conservation Act ("ANILCA"), Public Law 96-487. The subsistence preference established by Congress is confined to the federal "public lands" in Alaska. Immediately at issue is the question whether the term "public lands," as defined in ANILCA, includes navigable waters of Alaska in which the United States has an interest by virtue of the reserved waters doctrine. An affirmative answer to that question would permit a potentially massive federal intrusion into an area traditionally regulated by the State of Alaska. The answer given by the court of appeals was affirmative.

Amici States are alarmed by the analytical method employed by the court of appeals to substitute *Chevron*[1] deference for the "clear statement" rule, required by principles of federalism, and also by the court's interpretation of boilerplate language found in hundreds of federal statutes. For the first time, to our knowledge, the

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[1] Chevron USA Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

reserved waters doctrine has been applied by a court to expand the boundaries of federal public land.

## Interest of Amici States

The Western States are characterized by vast areas of federally owned public lands, large tracts of which are reserved from the public domain for purposes of Indian reservations, national parks, national recreation areas, national forests, national wildlife refuges, and national wild and scenic rivers. Water is an important tool in the management of these and other lands, especially in the arid Western States.

In the present case, two features of the decision of the court of appeals are of concern to Amici States: (1) its method of preemption analysis, in an area of traditional state authority, which eviscerates the "clear statement" rule; and (2) its unprecedented holding that the reserved waters doctrine can be employed to expand public land boundaries.

In light of the modern disposition of this Court to view the structure itself of the federal government as the principal safeguard against preemption of state sovereignty, so-called process protection, *Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 547-554 (1985), it is critical that the "clear statement" rule, an essential adjunct of process protection, be observed and applied and not, as in the approach of the court of appeals, subverted through application of the *Chevron* rule of deference.

Further, in light of the complexity and controversy which characterize the reserved waters doctrine, it is simply unimaginable, in a statute designed to complete the process of allocating Alaska lands, *Amoco Production Co. v. Gambell*, 480 U.S. 531, 549 (1987), that Congress would have employed the reserved waters doctrine as a device for geographical delineation of the public lands when every attempt at the national level to address the "reserved waters" issue has underscored its complexity.

Notwithstanding the footnote assurance of the court of appeals[2] that its precedent has no precedential value to authorize federal "usurpation" in other states because "ANILCA applies only to Alaska" and because the court's interpretation of the public lands definition "is necessary to give meaning to [ANILCA's] purpose of providing an opportunity for a subsistence way of life," the broad implications of the court's holding are not so easily dismissed.

First, the ruling of the court of appeals interprets boilerplate language found in hundreds of statutes collected in Title 16 of the United States Code. The temptation to apply the court's interpretation to identical language in other public land statutes surely will be indulged by litigants seeking public land buffer zones

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[2] "Our interpretation of the term public lands in this case will not allow the United States to usurp state power over navigable waters elsewhere. ANILCA applies only to Alaska and our interpretation of its definition of public lands is necessary to give meaning to its purpose of providing an opportunity for a subsistence way of life." State of Alaska v. Babbitt, Appendix to the Petition of the State of Alaska for Writ of Certiorari 8, n.9. (hereinafter "Pet. App. ___").

and could well prove irresistible to a court, particularly if the results are congenial. Second, ANILCA is not the only federal statute possessing a broad statutory purpose. Broad statutory purpose of the Wilderness Act, for example, was precisely the driving wedge in *Sierra Club v. Yeutter*, 911 F.2d 1405 (10th Cir. 1990), an action to compel the Forest Service to assert impliedly reserved water rights in Colorado's twenty-four wilderness areas for adjudication within the state's water allocation system. Indeed, federal statutes expressing broad purposes are today the rule, not the exception. In consequence, Amici States file this brief because of their fundamental interest in avoiding the "usurpation" of state sovereignty, the facilitation of which is inherent in the ruling of the Ninth Circuit.

## REASONS FOR GRANTING THE WRIT

### 1. Federal Preemption In an Area Traditionally Regulated by the States Requires a Clear and Manifest Purpose on the Part of Congress, and the *Chevron* Rule of Deference is Not a Substitute Analysis.

Since statehood in 1959, management of the valuable fishery resources found within the navigable waters of Alaska has been one of the foremost regulatory activities of Alaska state government, and enormous resources of the State have been expended in the conservation of these fisheries. The court of appeals nevertheless determined that Congress, in ANILCA, intended to preempt state fishery management in some navigable waters, although the court was uncertain which navigable waters of Alaska

Congress had preempted. Missing from ANILCA's text or legislative history, according to the court below, was "the clear direction necessary to find that Congress spoke to the precise question of *which* navigable waters are public lands." Pet. App. 8.

Discovering no clear indication from Congress, the court of appeals turned immediately to the second step of the *Chevron* analysis: "Lacking clear direction, we must decide whether the federal agencies' conclusion that public lands include some navigable waters under the reserved water rights doctrine is based on a permissible construction of the statute." Pet. App. 9. Observing that intent to reserve waters is inferred when Congress sets aside parcels for federal purposes, it followed for the court below that the United States has interests in some navigable waters. On that basis, the court of appeals "held to be reasonable" the federal agencies' conclusion that the definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine. Pet. App. 12. The court below held also "that the federal agencies that administer the subsistence priority are responsible for identifying those waters." Ibid. Subsequent to the April 20, 1995 ruling of the court of appeals in this case, the Alaska Supreme Court handed down its decision in *Totemoff v. State* 905 P.2d 954 (Alaska 1995), which conflicts directly with the Ninth Circuit ruling on the geographic scope of "public lands," as defined in ANILCA.

Numerous Supreme Court precedents lay out the path which the court of appeals was obliged to follow in deciding whether "public lands," as defined in ANILCA,

include navigable waters of Alaska. The fisheries in the navigable waters of Alaska traditionally have been managed by the State and, in such circumstances, courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This "assumption" provides assurance that the federal-state balance will not be disturbed unintentionally by Congress or unnecessarily by the courts. *United States v. Bass*, 404 U.S. 336, 349 (1971). The Supreme Court's reluctance to find preemption where Congress has not spoken directly to an issue is rooted in principles of federalism and respect for state sovereignty. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (concurring opinion of Blackmun, J.).

Indeed, if the reserved powers of the several States include the power to enact laws and to give effect to such laws through executive action, then the assumption that enacted state laws are not to be overridden under the Supremacy Clause unless congressional intent is clear finds structural support in the Tenth Amendment. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law"); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-147 (1963) ("[W]e are not to conclude that Congress legislated the ouster of this [state] statute . . . in the absence of an unambiguous congressional mandate to that effect"); *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 780 (1947) ("Any indulgence in construction should be in favor of the States, because

Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States"). And if, as stated in *Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 550-551 (1985), the principal means chosen by the Framers to ensure the role of the States in the federal system is to be found in the structure of the federal government rather than in discrete limitations of federal powers, then the "clear statement" rule takes on added constitutional significance for it is an essential adjunct in the process protection of the States. *But cf. United States v. Lopez*, ___ U.S. ___, 115 S.Ct. 1624, 1629-30 (1995).

The court of appeals not only failed to honor its obligation to apply the "clear statement" requirement, it failed even to acknowledge its existence. Instead, the court below determined that Congress did not speak to the precise question of which navigable waters are "public lands," and proceeded immediately to ascertain whether the federal agency position in the litigation is based on a permissible construction of the statute.[3] Not

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[3] The inappropriateness of *Chevron* deference in this case is heightened by the fact that the agency interpretation is a litigating position, not final agency action adopted with the safeguards of public procedure. As described by the court of appeals, "Prior to oral argument before the district court, the federal agencies agreed with the state. But at oral argument, those agencies modified their position, arguing that public lands include those navigable waters in which the federal government has an interest under the reserved water rights doctrine." Pet. App. 6. The Supreme Court has refused to apply *Chevron* deference to agency litigating positions that are unsupported by regulations, rulings or administrative practice. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988).

whether the agency reflected the clear purpose of Congress, but whether the agency reading possesses a rational basis.

These modes of analysis are not interchangeable, and their purposes differ. The "clear statement" rule is rooted in federalism, the *Chevron* rule of deference in separation of powers. The "clear statement" rule safeguards state sovereignty by ensuring that, absent unambiguous evidence of Congress's intent, traditional state police powers are not to be preempted. *Chevron* deference, by contrast, comes into play when congressional intent is ambiguous, permitting a federal agency vested with authority to administer a statute to fill in the statutory gaps and requiring a reviewing court not to trench on the view of a coordinate branch, if it be reasonable, regardless of what the court's view might have been *de novo*.

The two methods of analysis can be harmonized only if courts fulfill their obligation under the first step of *Chevron*: "On a pure question of statutory construction, our first job is to try to determine congressional intent, using 'traditional tools of statutory construction.' If we can do so, then that interpretation must be given effect. . . . " *National Labor Relations Bd. v. United Food & Commercial Workers*, 484 U.S. 112, 123 (1987). The "clear statement" rule is one of the tools which courts must apply, and being rooted also in the Constitution, its provenance is no less impressive than that of *Chevron* step two. For a finding of intention to preempt, a clear and manifest purpose of Congress is "always required." *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988). If analysis of the statute discloses no such intent, then the "clear statement" rule must be

given effect and the preemption inquiry is at an end. This is the method of analysis employed by Circuit Judge Hall, in dissent, viz., to attempt to determine whether clear congressional intent exists to preempt state authority through an examination of statutory text and, if such intent not be found, to decline the temptation to rewrite the statute to achieve congenial results. Pet. App. 15-22, 23-24.

According to this Court, "The subsistence-protection provisions of the statute must be viewed in the context of the Act as a whole." *Amoco Production Co. v. Gambell*, 480 U.S. 531, 549 (1987). By contrast, the ruling of the court of appeals is conspicuous for its reliance on broad statutory purpose and for its failure to pursue a close reading of the text of the "public lands" definition. The court below also failed entirely to relate that definition to other provisions such as the explicit jurisdictional limitation in section 1314(a) and (b), 16 U.S.C. § 3202(a), (b). The latter provisions of ANILCA are devoted expressly to the preemptive scope of the statute, and specifically with respect to fish and wildlife, the very subject matter of this litigation. These provisions expressly fence off from the Secretary any authority over the public lands unless "specifically provided by this Act." By its terms, therefore, section 1314(b) requires that secretarial authority be specifically provided and thereby forecloses any argument for authority in the Secretary emanating from broad statutory purpose, precisely where the court of appeals sought refuge.

The court of appeals expressly declined to yield to statutory text, declaring that if it gave meaning to the term "title" in the definition it would undermine broad

statutory purpose, and this it was unwilling to do. Pet. App. 13. Instead, the court of appeals substituted the second step of *Chevron* for the "clear statement" rule with the result that, while a clear and manifest purpose by Congress to preempt traditional state authority is always required, if missing it can be supplied by the determination of a federal agency which purports to be vested with authority to administer the federal statute,[4] provided only that there be found some rational basis for the agency determination. In the analysis of the Ninth Circuit, therefore, the failure to identify in the statute a necessary basis for preemption triggers deference to a federal agency finding of preemption. That, of course, turns the "clear statement" requirement on its head.

Instead of assuring that the federal-state balance will not be disturbed unnecessarily by the courts, substitution of *Chevron* deference for the "clear statement" requirement eviscerates the latter in a case such as this, tipping the scales decisively against state sovereignty. If, in fact, the rule in *Chevron* may be so manipulated that state

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[4] Concerning the more fundamental issue of whether the Secretary (of the Interior and of Agriculture) has been vested with authority to manage fish and wildlife on the public lands of Alaska to implement the subsistence preference of ANILCA § 804, and thereby preempt traditional state authority on the public lands, the district court also short-circuited the "clear statement" rule and ignored the express directive of ANILCA § 1314(b) by attributing the absence of a clear and manifest purpose to preempt to *congressional inadvertence*: "The court concludes that Congress unintentionally and inadvertently omitted an express provision authorizing the Secretary to implement Section 804 in the absence of a state program." John v. United States, 1994 WL 487830 at *7 (D. Alaska 1994).

sovereignty occupies such a precarious position, and if the federal courts must avoid judicial usurpation of functions entrusted by Congress to a coordinate branch but may, employing *Chevron* deference, allow usurpation of powers traditionally exercised by the States, then this Court should announce the matter so that Congress may know that a long line of Supreme Court precedents does not mean what it says and that the burden in preemption issues has shifted fundamentally. In that way, Congress may be advised that it must leave nothing to chance if process protection is to have any vitality.

**2. Public Land Boundaries Are Not Linked to Reserved Water Rights, and the Statutory Language Invoked by the Court of Appeals to Achieve this Remarkable Result is Boilerplate Having No Such Purpose.**

If the court of appeals is correct in holding that use of the word "interests" in the ANILCA "public lands" definition, 16 U.S.C. § 3102(1)-(3), calls into play the reserved waters doctrine to determine the geographic boundaries of public lands in Alaska, then the foundation is laid for a massive extension of federal authority in States where federal lands are set aside for specific purposes. This for the reason that the language "land, water and interests therein" is boilerplate repeated *in haec verba* in hundreds of statutes compiled in Title 16 of the United States Code to authorize federal officials to acquire property interests for parks and conservation.[5]

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[5] E.g., 16 U.S.C. §§ 90, 90b(a), 110c(c)(3), 121, 228b(a), 230a(b), 230g(a), 272(a), 273(a), 398d(a), 410j, 410o, 410p(a), 410bb(b)(1), 410ff-1(a), 410gg, 410gg-1(a), 410ii-3(a), 410jj-3(c),

As evident throughout Title 16, the term "interests" in lands or waters is employed to denote something less than a fee simple interest and includes easements, scenic or other, 16 U.S.C. §§ 410ff-1(a), or leasehold interests, 16 U.S.C. §§ 230a(a), 410qq-2(a), or "freehold, leasehold or lesser interest," 16 U.S.C. § 459c-7, or "contracts for options to acquire" lands, waters and interests therein. 16 U.S.C. § 460*l*-10b. Throughout Title 16, the Secretary of the Interior is authorized to acquire "lands, waters and interests therein" by purchase, donation or exchange. E.g., 16 U.S.C. §§ 90b, 398d(a), 410j, 459h-1(a), 460cc-1(a), 460aaa-3(a), 698(c). Because Congress obviously is employing the phrase in its ordinary property sense, it often uses the phrase in a way that is wholly incompatible with any notion that the term "interests" includes federal reserved water rights. E.g., 16 U.S.C. § 230a(a) (lands, waters and interests therein owned by the State of Louisiana); 16 U.S.C. § 410o (authorizing the Secretary of the Interior to transfer to the State of Florida by quitclaim deed the land, water and interests therein previously acquired by the United States for Everglades National Park); 16 U.S.C. § 460*l*-8(a) (authorizing the Secretary to make payments to States for acquisition by the States of lands, waters and interests); 16 U.S.C. § 471i(h)(1)(A) (authorizing the Secretary of the Interior to make grants to the State of New Jersey for acquisition of lands, waters and interests therein in the Pinelands National Reserve).

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410mm-2(b), 410qq-2(a), 410rr-2, 410rr-7(c), 459d-3(a), 459e-1(a), 459h-1(a), 459h-3, 459i-1, 459j-1, 460*l*-8(a), 460*l*-9(a)(1), 460*l*-10a, 460*l*-10b, 460m-3, 460m-9(a), 460m-16(a), 460p-2(a), 460q-2(a), 460r-2(a), 460s-7(a), 460z-6(a), 460z-13, 460aa-12, 460bb-3(a), 460cc-1(a), 460ee(c)(1), 460ff-1(b), 460ii, 460ii-1(a), 460kk(c)(1), 460ww(b).

Given the nature of the reserved waters doctrine, it is inconceivable that Congress intended to employ it as a geographic delineator of public land boundaries. The reserved waters doctrine certainly may involve the right to use the waters of a navigable stream yet the water column itself, the corpus of a navigable stream, never becomes, or in the nature of things, can become the subject of fixed appropriation or exclusive dominion. "Neither sovereign nor subject can acquire anything more than a mere usufructuary right therein . . . . " *Sweet v. Syracuse*, 129 NY 316, 335, 27 NE 1081, 1084 (1891), quoted with approval in *Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 247 n.10 (1954).

An intention by Congress to reserve previously unappropriated waters to accomplish the purposes for which a reservation of public lands is established is inferred and need not otherwise be demonstrated. *Cappaert v. United States*, 426 U.S. 128, 139 (1976). But congressional intent to employ the reserved waters doctrine as delineator of the geographic scope of federal public lands is something else again. Owing to the nature of the reserved waters doctrine, the idea that it serves the purpose of geographic delineation is so bizarre that a demonstration is required that Congress had it in mind. However, as stated by the district court, there is no reference to the reserved waters doctrine in ANILCA or in its voluminous legislative history.

The reserved waters doctrine is a doctrine of need, and state courts are the fora to define and clarify the scope of reserved federal water rights. Any implied reservation relates only to use of the minimum amount of

water necessary to fulfill the specific purposes of a reservation, not more. *Cappaert v. United States*, 426 U.S. 128, 141 (1976).[6] Congress in the 1952 McCarran Amendment, 43 U.S.C. § 666, waived the sovereign immunity defense of the United States in state river system adjudications to allow federal water rights to be determined along with state rights, thereby achieving an equitable and orderly allocation in time of shortage. This Court has held that federal reserved water rights are also subject to the McCarran Act waiver in such state adjudications. *United States v. District Ct. For Eagle County*, 401 U.S. 520 (1971).

The judicial mechanism to quantify reserved rights to use of water is complex, protracted and costly, a single adjudication characteristically taking years to resolve. The Wyoming state court determination in the Big Horn River Adjudication, which quantified the reserved rights of the Shoshone and Arapahoe Tribes, took eleven years to conclude. *In Re Rights to Use Water in the Big Horn*

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[6] Not only is there no mention of reserved water rights in ANILCA or its voluminous legislative history, there is, in general, no need to quantify reserved water rights in Alaska for an abundance of water exists in that state. Southeastern Alaska and the coastal area south of the Alaska Range, which includes Tanada Creek and the Copper River within the Wrangell-St. Elias reservation, the area of dispute in this litigation, possesses a maritime climate much affected by the Japan current. Annual precipitation is heavy, in the form of rain near sea level and in the form of snow at medium and high elevations. Report on Water Resources of Alaska Prepared for the Senate Select Committee on National Water Resources, Department of the Interior, page 1 (Basic Physical Data), December 1959. With respect to arms of the sea which are appurtenant to much of Southeastern Alaska, the reserved waters doctrine has never been applied to marine waters.

*River*, 753 P.2d 76 (Wy. 1988), aff'd *Wyoming v. United States*, 492 U.S. 406 (1989).

While the broad legal principle is easily asserted ("Let us hope," said the court of appeals, Pet. App. 13, "that federal agencies will determine promptly which navigable waters are public lands subject to federal subsistence management"), every attempt at the national level to address the reserved waters issue has immediately confronted its uncertainty.[7] Until the scope of the

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[7] The 1970 report to Congress of the Public Land Law Review Commission, established by Public Law 88-606, declared that while the reservation doctrine should not be discarded, "Nevertheless, the implied reservation doctrine as announced and applied in *Arizona v. California* has created many problems. Numerous unanswered questions about its scope and impact remain. The two most important questions which Congress should resolve, however, center on (1) the uncertainty which the doctrine has engendered, and (2) the equity of holders of water rights. . . . " One Third of the Nation's Land, A Report to the President and Congress by the Public Land Law Review Commission, 146 (Washington, D.C., June 1970).

The 1973 report to Congress of the National Water Commission, established by Public Law 90-515, observed that reserved rights "create large uncertainties in the water budgets of Federal and State water resources planners and private investors" and recommended to Congress that federal water uses be quantified in conformity with State law. Water Policies for the Future, Final Report to the President and Congress by the National Water Commission, 465-466 (Washington, D.C., June 1973).

The 1977 report of the Federal Reserved Water Rights Task Group, convened as part of President Carter's Water Resources Policy Review, see 42 Fed. Reg. 37940, 37957 (October 20, 1977), observed that "the absence of identification and quantification of most of the reservations of water has caused considerable

reserved water right is quantified in state adjudication, the extent of the right is unknown. Teams of specialists in hydrology, geomorphology, aquatic and riparian biology, limnology and botany would be necessary to quantify the minimum amount of water necessary to support the numerous and complex dynamics of the specific purpose or purposes for which a particular conservation unit in Alaska was set aside. As stated by the dissenting judge, the task of determining the exact quantity of water necessary to achieve the goal of subsistence fishing "would be an administrative nightmare." Pet. App. 20.

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uncertainty for all parties using water or administering water rights." And later in the report: "The failure to identify and quantify Reserved Rights has raised some serious issues complicating Federal-State regulations." Federal Reserved Water Rights Task Group Report, 5, 6 in Water Resource Policy Study, December 6, 1977.

The 1978 report to Congress of the Comptroller General, Reserved Water Rights for Federal and Indian Reservations: A Growing Controversy in Need of Resolution, CED-78-176 (November 16, 1978), asserted as its principal (cover page) conclusion: "Undetermined Federal and Indian reserved water rights in the Western States are causing great uncertainties about existing water uses" and that "there is an urgent need to settle the problem because the controversy is becoming more acute as new and existing water uses place greater demands on the limited water supply in the United States."

Congress in the 1971 Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1629, expressly contemplated that there would be an Alaska lands act, 43 U.S.C. § 1616 (d)(2), and worked almost continuously on the "(d)(2)" legislation from 1972 to ANILCA's enactment in 1980, the period when the reports cited above were being received by Congress.

The court of appeals determined that Congress in ANILCA "spoke to the precise question of whether *some* navigable waters may be public lands." Pet. App. 8 (italics in original). This the court inferred from section 804 of ANILCA which establishes a priority on public lands to take fish and wildlife for subsistence purposes. 16 U.S.C. § 3114. Because subsistence uses include fishing and since, according to the court of appeals, "subsistence fishing has traditionally taken place in navigable waters," the court concluded: "[W]e have no doubt that Congress intended that public lands include at least some navigable waters." Pet. App. 8. This inference forms the fundamental premise of the court's ruling, its enabling condition, but it is a flagrant *non-sequitur*. First, Congress expressly limited the section 804 preference to the "public lands," as defined, not to places where subsistence fishing has traditionally occurred. This Court once before rejected a comparable notion "that Congress was merely waving its hand in the general direction of northwest North America when it defined the scope of ANILCA . . . . " *Amoco Production Co. v. Gambell*, 480 U.S. 531, 548 (1987). Second, subsistence fishing occurs throughout non-navigable waters of Alaska so the statutory priority would by no means be a nullity if it did not extend to navigable waters.

By its very nature the reserved waters doctrine is unsuitable as a geographical delineation device. Moreover, in view of its complexity and uncertainty, well known to Congress, it is inconceivable that Congress would have employed the doctrine to delineate the geographic boundaries of the public lands in Alaska. Such a

conception is wholly artificial and totally devoid of practicality. Nevertheless, its implications for expansion of federal authority are far reaching.

## CONCLUSION

For the reasons set forth, the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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In The

# Supreme Court of the United States

October Term, 1995

STATE OF ALASKA,

*Petitioner,*

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, et al.

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PRIVATE RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

Whether the definition of "public lands" in § 102 of the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. §§ 3102(1)-(3), encompasses appurtenant navigable waters reserved as necessary parts of the various federal reservations Congress has set aside from the public domain in Alaska, thereby making the priority for subsistence fishing on the "public lands" mandated by §§ 803-805 of ANILCA, 16 U.S.C. §§ 3113-3115, applicable to such waters?

Alternatively, are all navigable waters in Alaska "public lands" to which the ANILCA subsistence priority applies by virtue of the United States' navigational servitude?

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## PRIVATE RESPONDENTS' BRIEF IN OPPOSITION[1]

### OPINIONS BELOW

The Ninth Circuit's opinion (Pet. App. 1) is now reported at 72 F.3d 698 (Dec. 19, 1995), *superseding* 54 F.3d 549 (April 20, 1995). The district court's opinion granting partial summary judgment to private respondents is unreported, Nos. A90-0484 & A92-0264-CV (HRH), 1994 WL 487830 (D. Alaska, March 30, 1994), and is reproduced in the Supplemental Appendix ("Pet. Supp. App.") filed by petitioner.

### STATEMENT

This case presents an issue of statutory interpretation involving one section of the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. §§ 3102(1)-(3), a statute unique to Alaska with no application to any other state.

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[1] Private respondents are the non-governmental parties in two cases which were consolidated for disposition below: *Katie John v. United States*, No. A90-0484-CV (HRH), and *Alaska v. Babbitt*, No. A92-0264-CV (HRH) (D. Alaska). Private respondents are the plaintiffs in the *Katie John* case, who are two individual Alaska Natives (Katie John and Doris Charles) and a federally recognized Indian tribe (Mentasta Village Council); and the Alaska Federation of Natives ("AFN"), a statewide Native organization, which was permitted to intervene as a defendant and to file a cross-claim against the federal defendants in the *Alaska v. Babbit* case.

**The Statutory Background And Framework**

In § 4 of the Alaska Statehood Act, Congress required the newly admitted State to "forever disclaim all right and title . . . to any lands or other property (including fishing rights)" of Alaska Natives, which lands and other property "shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe." Pub. L. No. 85-508, 72 Stat. 339 (1958), as amended, 73 Stat. 141 (1959).[2] Under the terms of Alaska's admission to the Union, therefore, the fishing rights of Alaska Natives, including their rights to fish in the navigable waters of the State, *see Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), were expressly reserved by Congress for its own disposition. *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962).

With enactment of the Alaska Native Claims Settlement Act ("ANCSA") in 1971, Pub. L. No. 92-203, 85 Stat. 688, 43 U.S.C. §§ 1601-1628, Congress confronted the land and land-related claims of Alaska Natives and extinguished hunting and fishing rights based on aboriginal title, 43 U.S.C. § 1603(b). At the same time, Congress

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[2] Similarly, in Article XII, § 12 of the Alaska Constitution of 1956, by which Alaska sought statehood, "[t]he State and its people further disclaim[ed] all right or title in or to any property, including fishing rights," of Alaska Natives, which "shall remain subject to the absolute disposition of the United States."

made clear its intent to continue federal protection of the subsistence hunting and fishing rights of Alaska Natives. Thus, while the Senate and the House were unable to agree on the best means for fulfilling this intent, the ANCSA Conference Committee recognized these rights and expressed the conviction that the Secretary of the Interior could "exercise his existing withdrawal authority" to "protect Native subsistence needs and requirements." H. CONF. REP. No. 92-746, 92d Cong., 1st Sess. 37 (1971), *reprinted in* 1971 U.S. CODE CONG. & ADMIN. NEWS 2247, 2250. The Report further stated: "The Conference Committee expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives." *Id.*[3]

Congress returned to the subject in 1980 in the Alaska National Interest Lands Conservation Act ("ANILCA"), Pub. L. No. 96-487 (Dec. 2, 1980), 94 Stat. 2371. There, Congress undertook two principal comprehensive purposes: (1) to set aside, expand or redesignate vast tracts of the public domain in Alaska as various "conservation system units," in order to preserve the natural features and resources of those lands and waters

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[3] In the wake of ANCSA, Congress continued to act affirmatively to recognize and protect the subsistence rights of Alaska Natives. *See, e.g.*, Marine Mammal Protection Act of 1972, 16 U.S.C. § 1371(b) (expressly exempting from the taking moratorium "any Indian, Aleut, or Eskimo who dwells on the coast of the North Pacific Ocean or the Arctic Ocean," if such taking is for "subsistence purposes" or for the "creating and selling" of handicrafts and clothing); Endangered Species Act of 1973, 16 U.S.C. § 1539(e)(1) (again containing exemptions for subsistence uses by Natives and "any non-native permanent resident of an Alaskan native village").

for present and future generations; and (2) "to protect the resources related to subsistence needs" and "provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so." ANILCA §§ 101(a)-(c), 94 Stat. at 2374-75, 16 U.S.C. §§ 3101(a)-(c). With respect to the latter purpose – protecting the subsistence way of life of rural residents – Congress in Title VIII generally impressed all "public lands" in Alaska with a preference for subsistence uses of fish and wildlife over all other uses. ANILCA §§ 801-816, 94 Stat. at 2422-30, 16 U.S.C. §§ 3111-3126.[4] "Public lands" are defined as " 'lands, waters, and interests therein' 'the title to which is in the United States.' " *Amoco Production Co. v. Village of Gambell,*

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[4] This direct protection of the Native subsistence way of life is, in turn, reinforced in the specific primary purposes of many of the conservation system units established, redesignated or expanded by the Act. Subsistence uses are specifically authorized in all or significant parts of 12 of the 13 national parks and preserves addressed in the Act (§§ 201-202, 94 Stat. at 2377-83); all of them include the protection of habitat for, and populations of, fish and wildlife, usually specifically including salmon, as well as waterfowl and other migratory birds, among their express primary purposes; and three of them specifically mention as a primary purpose protection of "the viability of subsistence resources."

Similarly, 15 of the 16 national wildlife refuges established, redesignated or expanded by the Act expressly include "the opportunity for continued subsistence uses by local residents" as a primary purpose of the refuge. ANILCA §§ 302-303, 94 Stat. at 2385-93. Each of the 16 refuges includes among its explicit purposes the conservation of fish and wildlife populations (specifically listing "salmon" or "salmonoids" in all refuges where such species are found), the fulfillment of "international treaty obligations," and the assurance of "water quality and necessary water quantity."

480 U.S. 531, 548 n.15 (1987) (melding the definition in ANILCA §§ 102(1)-(3), 16 U.S.C. §§ 3102(1)-(3)).

Congress used the term "fish" over twenty times in Title VIII, with good reason. Almost invariably, the largest subsistence food source for Alaska Natives is fish, accounting by weight for some two-thirds of the statewide subsistence harvest. In addition to its nutritional value, subsistence fishing provides vital social and cultural values for Alaska Native Villages; it is a central factor unifying tribal families and communities. *See, e.g., Native Village of Quinhagak v. United States*, 35 F.3d 388 (9th Cir. 1994); *United States v. Alexander*, 938 F.2d 942 (9th Cir. 1991); *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312 (9th Cir. 1988), *cert. denied*, 491 U.S. 905 (1989).

While protection of the subsistence way of life of Alaska Natives was the driving concern of Title VIII, Congress in the end afforded the subsistence-use preference to all "rural residents." Congress did so to accommodate Alaska's concern that the Alaska Constitution prevented the State from providing a subsistence priority limited to Alaska Natives. *See Kenaitze Indian Tribe v. Alaska, supra*, 860 F.2d at 313 n.1. Accordingly, in Title VIII Congress found that

> in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents.

ANILCA § 801(4), 16 U.S.C. § 3111(4).[5] Congress declared its policy to be that "the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands," and that "nonwasteful subsistence uses of fish and wildlife and other renewable resources shall be the priority consumptive uses of all such resources on the public lands of Alaska." ANILCA §§ 802 (1) and (2), 16 U.S.C. §§ 3112(1) and (2). The substantive provisions of the title define subsistence uses as the "customary and traditional uses" of fish and wildlife resources by "rural Alaska residents" (§ 803), and confer a priority for the taking of fish and wildlife for subsistence uses on the "public lands" (§ 804). 16 U.S.C. §§ 3113, 3114.

In addition to substituting a "rural" hunting-and-fishing preference for a "Native" one, Congress sought to accommodate Alaska's interests in another significant way: by enabling the State to have primary regulatory responsibility for assuring the priority for subsistence uses of fish and wildlife on all lands and waters, federal as well as State. Thus, while subsections 805(a) through (c) require the Secretary to implement a comprehensive subsistence-use management system on the public lands,

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[5] Congress determined that the opportunity for continued subsistence uses "is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence" (§ 801(1)), but that the opportunity "is threatened by the increasing population of Alaska" and the "increased accessibility of remote areas containing subsistence resources," among other things (§ 801(3)). 16 U.S.C. § 3111.

16 U.S.C. §§ 3115(a)-(c), and § 814 directs that the Secretary "shall prescribe such regulations as are necessary and appropriate to carry out his responsibilities under this title [VIII]," 16 U.S.C. § 3124, the State is given the power to supplant federal management by § 805(d), 16 U.S.C. § 3115(d):

> The Secretary shall not implement subsections (a), (b), and (c) of this section if within one year of the date of enactment of this Act, the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, sections 803, 804, and 805, such laws, unless and until repealed, shall supersede such sections insofar as such sections govern State responsibility pursuant to this title for the taking of fish and wildlife on the public lands for subsistence uses.

Finally, § 807(a) affords subsistence users a private right of action in federal court to enforce the subsistence priority against either the State or the Secretary (depending on which of them is exercising management authority). 16 U.S.C. § 3117(a).

Congress expressly acknowledged that by these provisions it was imposing conditions on the State's "traditional" authority to regulate the taking of fish and wildlife on the public domain. Consequently, ANILCA § 1314 states that "[n]othing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands *except as may be provided in Title VIII*, or to amend the Alaska constitution," nor "to enlarge or diminish" the Secretary's responsibility and authority

over management of the public lands *"[e]xcept as specifically provided otherwise by this Act."* 16 U.S.C. §§ 3202(a) and (b) (emphases added).

**The Background Of This Litigation**

As noted above, § 805 of ANILCA requires the Secretary to implement a subsistence-preference management program on the public lands if the State either fails to enact or repeals State laws of general applicability that conform with the requirements of §§ 803-805 of the Act. Initially the State accepted the congressional conditions, and on May 14, 1982, the Secretary of the Interior certified the State's statutory and regulatory program as complying with §§ 803-805 of ANILCA, expressing his determination that "[a]s a result of this certification of compliance, the State retains its traditional role in the regulation of fish and wildlife resources on the public lands in Alaska."[6] When three years later the Alaska Supreme Court held that the "rural residents" restrictions of the State's regulatory program were inconsistent with the then-extant version of the State statute, *Madison v. Alaska Dept. of Fish & Game*, 696 P.2d 168 (Alaska 1985), the Legislature promptly corrected the statute in the hope of complying with ANILCA and retaining state subsistence-management authority on the public lands. *See Kenaitze Indian Tribe v. Alaska, supra*, 860 F.2d at 314; *Bobby v. Alaska, supra*, 718 F. Supp. at 768.

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[6] Letter from Secretary Watt to Governor Hammond, *reprinted in Bobby v. Alaska*, 718 F. Supp. 764, 812-13 (D. Alaska 1989).

Unexpectedly in December of 1989, however, the Alaska Supreme Court held that the Alaska Constitution prohibits the Legislature from enacting a subsistence-use priority that is limited to rural residents. *McDowell v. State*, 785 P.2d 1 (Alaska 1989) (decision stayed until July 1, 1990). The court acknowledged the pre-emptive scope of ANILCA,[7] and that the result of its holding would be the loss of state subsistence-management authority on federal lands and waters. *Id.* at 10 n.20.[8]

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[7] *See* 785 P.2d at 3 ("ANILCA requires federal management of public lands in Alaska in order to ensure the subsistence priority. However, federal management may be supplanted by the state so long as the state enacts and implements subsistence laws 'which are consistent with, and which provide for the definition, preference, and participation specified in' ANILCA," *quoting* 16 U.S.C. § 3115(d) (footnotes omitted)).

[8] With the "rural preference" of State law severed on constitutional grounds, Alaska continues to have a law that purports to afford a priority for subsistence uses on lands and waters that remain under State jurisdiction. This so-called priority, however, in reality dilutes the rights of true subsistence users. Under State law, all Alaska residents who hunt and fish are deemed to be subsistence users, and hence eligible to participate in any subsistence hunt or fishery anywhere in the State. *See State v. Morry*, 836 P.2d 358 (Alaska 1992). Consequently, urban hunters and fishers are entitled to travel to any rural area in the State and hunt and fish on the same "priority" basis as local villagers – precisely one of the principal reasons Congress found it necessary to afford a priority to *rural* residents. *See* note 5, *supra*. At the same time, true Native subsistence users who are residents of areas recently classified as "non-subsistence" under State law, but which are deemed rural under federal law, are *prohibited* under Alaska law from engaging in subsistence hunting and fishing in their historical local use areas (insofar as these lands and waters are not federal "public lands"). *Compare Kenaitze Indian Tribe v. Alaska, supra*, with *State v. Kenaitze Indian Tribe*, 894 P.2d 632 (Alaska 1995).

In the wake of *McDowell*, the Secretary implemented a subsistence-management program for the public lands in Alaska. 55 Fed. Reg. 27,114 (June 29, 1990) (temporary subsistence management regulations); 57 Fed. Reg. 22,940 (May 29, 1992) (permanent regulations); *see* 36 C.F.R., Part 242; 50 C.F.R., Part 100. That program has been in effect, and the State's authority over subsistence uses of fish and wildlife on the public lands (some two-thirds of Alaska's landmass) correspondingly circumscribed, for over five years. So far, however, the protection of federal law has been limited primarily to subsistence uses of land mammals on federal fast-lands, with no protection for the vast majority of subsistence fisheries that are the object of keen competition from sport and commercial users. This is because the federal program has excluded from its protective coverage most of the important subsistence fishing grounds of rural Alaska Natives and other residents. Indeed, at the outset it was the Secretary's avowed policy to implement a program "that minimizes change to the State's program" in order to avoid "unnecessary chaos if and when the State is able to bring its subsistence program back into compliance with ANILCA." 55 Fed. Reg. 23,522 (June 8, 1990). *See also* 55 Fed. Reg. at 27,115 (June 29, 1990). Nowhere was the effort at minimizing more complete than with respect to the exclusion of the majority of navigable waters (and hence the majority of subsistence fishing) from the "public lands" scope of the program. *See* 55 Fed. Reg. at 23,526 (proposed temporary regulations) (defining "public lands" as including certain federal lands, and "*Federal lands* means lands the title to which is in the United States"); 55 Fed. Reg. at 27,122

(adopting proposed regulations). The Secretary explained that, although the statutory definition of "land" includes "interests" in "waters" (16 U.S.C. § 3102(1)), navigable waters were being excluded from the federal program because "[t]he United States generally does not hold title to navigable waters." *Id.* at 27,115.

When the final regulations were adopted in 1992 (by which time it was apparent the State likely would not soon bring its program back into compliance with ANILCA), both the "public lands" definition and the explanation had changed, but the result remained essentially the same. Although the new definition now tracked the statutory language,[9] the Secretary continued generally to exclude navigable waters from the program's coverage, now on the basis of the ownership of the lands underlying such waters: "Because the United States does not generally own title to the submerged lands beneath navigable waters in Alaska, the public lands definition in ANILCA and these regulations generally excludes navigable waters." 57 Fed. Reg. at 22,942.[10] *See* Pet. Supp. App. 30-32.

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[9] "Federal lands means lands and waters and interests therein the title to which is in the United States." 57 Fed. Reg. 22,940, 22,952 (May 29, 1992).

[10] As a result, the only subsistence fishing protected by the federal program is that limited amount which takes place on non-navigable waters on federal lands, and the waters overlying certain tracts of submerged lands that were withdrawn by the national government prior to statehood. *See* 36 C.F.R. §§ 242.3(b) & (c); 50 C.F.R. §§ 100.3(b) & (c). In the overall context of subsistence fishing, this is very limited protection. The subsistence priority is needed most where there is the greatest competition over fishery resources; this

**The Proceedings Below**

On December 5, 1990, private respondents Katie John, et al., initiated suit against the Secretary in *Katie John v. United States* (*see* note 1, *supra*), alleging that the federal subsistence program mandated by ANILCA had been unlawfully restricted by excluding from its coverage navigable waters in which the United States owns interests (including their traditional subsistence salmon fishery at an ancient site known as Batzulnetas within the Wrangell-St. Elias National Park and Preserve). *See* Pet. App. 2; Pet. Supp. App. 23-25. The State was later added as a defendant. Over a year later, on February 27, 1992, the State filed its complaint in *Alaska v. Babbitt* (*see* note 1, *supra*), the main focus of which alleged (erroneously) that the Secretary had asserted subsistence-management jurisdiction over certain navigable and non-navigable waters belonging to the State, but which came to be understood as challenging the authority of the Secretary to implement *any* subsistence-management program on the public lands. Private respondent Alaska Federation of Natives was permitted to intervene as a defendant/cross-claimant. The cases were consolidated by the district court.

On March 30, 1994, the district court granted partial summary judgment to private respondents, upholding the authority of the federal government to implement a subsistence-management program on the "public lands" under Title VIII of ANILCA (Pet. Supp. App. 10-21),

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competition from commercial and sport user groups (and the great majority of subsistence fishing) takes place in the navigable waters that are excluded from the Secretary's 1992 "public lands" definition.

which the court then construed to encompass all navigable waters in Alaska by virtue of the navigational servitude of the United States. *John v. United States*, Nos. A90-0484 & A92-0264-CV (HRH), 1994 WL 487830 (D. Alaska) (Pet. Supp. App. 27-43). While the court expressed its agreement with the lesser proposition advanced by private respondents that ANILCA's "public lands" definition embraces appurtenant federal reserved waters, the court determined that the navigational servitude was more appropriate than the reserved-water-rights doctrine, and "more compatible with the findings and policies of Title VIII of ANILCA," in "determining the geographic scope of Title VIII." Pet. Supp. App. 33-34.

The State took a permissive appeal under 28 U.S.C. § 1292(b) as to both holdings of the district court. Although the Secretary also appealed from the holding as to the navigational servitude, during the pendency of the litigation the Secretary changed positions and acknowledged that the federal subsistence program should be extended to encompass those navigable waters in which the United States owns reserved water rights. Prior to oral argument in the Ninth Circuit, the State abandoned its appeal insofar as it concerned the issue of the Secretary's authority to provide for the subsistence priority on public lands, and the State accordingly entered into a stipulation dismissing the appeal of that issue with prejudice. The Ninth Circuit accepted the stipulation of dismissal, *Alaska v. Babbitt*, 54 F.3d 549, 551 n.2 (April 20, 1995), and this Court denied petitions for certiorari by the Alaska Legislature and the Alaska Outdoor Council seeking to resurrect the issue, 116 S. Ct. 68, 272 (Oct. 2, 1995).

On the issue of the scope of Title VIII's protection for subsistence fishing, the Ninth Circuit (with one judge eventually dissenting in part) reversed the district court's holding as to the navigational servitude, but also held (as the district court had implied) that federally reserved navigable waters are "public lands" under ANILCA, and that the Secretary has the responsibility for identifying those waters and extending the subsistence priority to them. 72 F.3d 698, 703-704 (Dec. 19, 1995) (Pet. App. 11-12), *superseding* 54 F.3d 549.

## REASONS WHY THE PETITION SHOULD BE DENIED

As the court below correctly observed (72 F.3d at 702 n.9 (Pet. App. 8 n.9)), this case is *sui generis*, involving as it does a singular statutory scheme with unique purposes applicable to Alaska alone. Contrary to the suggestions of petitioner and its *amici*, the decision below has no ramifications beyond the borders of Alaska.[11] Even with

[11] Alaska and its friends contend that the phrase "lands, waters and interests therein" (one component of the ANILCA definition of "public lands") is boilerplate routinely employed by Congress in establishing, and in authorizing federal acquisition of property for, parks and conservation areas. *See* Pet. at 15 n.5; Brief *Amici Curiae* for Arizona, et al., at 11-12. They point to no statute, however, which invokes that phrase in conjunction with a statutory definition of "public lands," much less one that uses these terms to define the scope of federally protected activities such as subsistence hunting and fishing. As this Court has held in the context of the same statutory language at issue here, the phrase "public lands" does not, "in and of itself," have "a precise meaning, without reference to a definitional section or its context in a statute." *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 548 n.15 (1987).

respect to its impact within Alaska, moreover, the decision below presents no issue warranting review here.

## I.

## CONGRESS CLEARLY INTENDED FEDERAL MANAGEMENT TO DISPLACE STATE MANAGEMENT OF ALL SUBSISTENCE FISHERIES THAT TAKE PLACE ON THE "PUBLIC LANDS," AND THE NINTH CIRCUIT CORRECTLY HELD THAT FEDERALLY RESERVED WATERS ARE "PUBLIC LANDS"

The State's reliance on the "clear statement" doctrine (Pet. 13-21) is difficult to fathom. In clear and unmistakable terms, Title VIII of ANILCA prescribes a system for ensuring a priority for subsistence uses of *fish* and wildlife on the "public lands," and just as clearly prescribes the requirements necessary for the State to supplant federal subsistence management on those lands. *See* pp. 3-8, *supra*. Further, § 102 of ANILCA defines "public lands" as lands, waters, and interests therein title to which is in the United States. It is thus plain that, if the State fails to comply with the prescribed conditions, Congress intended for the Secretary to ensure a priority for *all* subsistence fishing on *all* public lands. Indeed, the State appears to concede as much. *See* Pet. 9, 20-21.

The question presented by this case accordingly is not one governed by the "clear statement" doctrine, but rather by old-fashioned principles of statutory construction: Does ANILCA's definition of "public lands" encompass either (a) all navigable waters in Alaska (by virtue of the United States' navigational servitude) or (b) appurtenant navigable waters reserved as parts of the federal reservations Congress has set aside in Alaska? The Ninth

Circuit correctly answered the latter part of that question, and the correct answer to the first part also sustains its judgment. Further review is unwarranted.

1. It appears to be undisputed that, in establishing and expanding numerous "conservation system units" (defined in ANILCA § 102(4), 16 U.S.C. § 3102(4)) in Alaska, Congress also "reserve[d] appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138 (1976). Nor, as the district court noted (Pet. Supp. App. 32-33), is there any dispute that waters appurtenant to Wrangell-St. Elias National Park (where private respondents' subsistence fishery is located) were reserved as part of the Park. This Court has established a relatively simple test for ascertaining the nature and scope of federally reserved waters:

> In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.

*Cappaert, supra*, 426 U.S. at 139. The Court has explained that identifying what is "necessary to accomplish the [reservation's] purposes" entails a determination "that without the water the purposes of the reservation would be entirely defeated." *United States v. New Mexico*, 438 U.S. 696, 700 (1978). Lack of appurtenant water plainly would defeat the purposes of many, if not most, federal reservations in Alaska. *See, e.g.*, note 4, *supra*.

2. Any debate over ANILCA's definition of "public lands," and its use of the term "title" in conjunction with "interests" in "waters," 16 U.S.C. §§ 3102(1) & (2), was resolved by this Court in *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 548 n.15 (1987) (which neither the State in its petition nor the Alaska Supreme Court in its *Totemoff* argument (*see* part II, *infra*) even mention). In *Gambell*, the Court construed this very definition and rejected any hypertechnical reading of "title." 480 U.S. at 548 n.15. The issue there concerned the government's contention that the Outer Continental Shelf is not "public lands" under ANILCA because the United States does not claim "title" to the OCS. Said the Court (*id.*):

> The United States may not hold "title" to the submerged lands of the OCS, but we hesitate to conclude that the United States does not have "title" to any "interests therein." Certainly, it is not clear that Congress intended to exclude the OCS by defining public lands as "lands, waters, and interests therein" "the title to which is in the United States." We also reject the assertion that the phrase "public lands," in and of itself, has a precise meaning, without reference to a definitional section or its context in a statute. See *Hynes v. Grimes Packing Co.*, 337 U.S., at 114-116.

This construction of the statute forecloses the State's present attempt to read "interests in waters" out of the statutory definition. For if the only waters encompassed in the ANILCA definition were those overlying the *submerged lands* which are owned by the United States, the statutory reference to separate "interests in waters" would be rendered superfluous.

The State and its Supreme Court have also failed to analyze and appreciate numerous authorities holding that riparian interests in waters such as the reserved waters at issue here, although usufructuary as opposed to possessory, nonetheless constitute real property interests that may be assigned and mortgaged, bought, leased and sold, and may not be taken without just compensation. *See, e.g., Dugan v. Rank*, 372 U.S. 609, 625 (1963); *FPC v. Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950). Nor may a state, absent specific congressional authority, "destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property." *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899). The reserved waters appurtenant to federal reservations in Alaska are an essential part of the reservations themselves, to which the United States holds "title" as that term is employed in the statutory definition and context.

3. The State's assertion (Pet. 19) that classifying federal reserved waters as public lands results in a definition that is "so difficult to apply" and "meaningless" is hard to grasp.[12] The suggestion that reserved waters do not

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[12] The State informs the Court that "a federal interest in lands or waters might constitute 'public lands,' but the existence of the interest does not convert vast areas of land and waters into 'public lands.' " Pet. 19 n.7. The point is obscure. If it is that the interest in waters constituting public lands may not be construed as abrogating the remaining interests in those waters held by others, including the State, the point may be conceded. But under the statutory definition the waters are still "public lands" to which ANILCA applies.

constitute a "definite area" (*id.*) is quite mistaken. While there might be future discrete controversies over whether a particular reservation includes appurtenant waters, we have no doubt in the ability of federal land-management agencies generally to identify those appurtenant rivers and streams, or portions thereof, that are reserved as part of the reservation. Nor is there any need in the context of this litigation, as argued by the State (*id.* at 19-20) and the dissenting judge below (Pet. App. 20), for the government to *quantify* the "minimum amount of water" that must be preserved for the reservations. All that is at issue here is whether these indisputably federal interests in the waters qualify them as public lands to which the Title VIII priority for subsistence fishing applies, and that is all the Ninth Circuit has held. Title VIII requires the Secretary to assure the priority for subsistence fishing on *all* public lands, regardless of their particular purposes, unless prohibited by some other provision of ANILCA or other federal laws. *See, e.g.*, ANILCA § 804, 16 U.S.C. § 3114. The federal management obligation is imposed by ANILCA itself, not by the various interests in lands and waters which make them public lands.

4. The State also contends that Alaska's ownership interest in lands, waters and natural resources granted by the Submerged Lands Act of 1953 (SLA), 43 U.S.C. §§ 1301 *et seq.*, constitutes an exception to ANILCA's "public lands" definition since § 102(3)(A) of ANILCA exempts from "public lands" those "lands which have been . . . granted to . . . Alaska . . . under any other provision of Federal law." 16 U.S.C. § 3102(3)(A).

The State's SLA contention suffers from a fundamental flaw in its premise. Although § 6(m) of the Alaska

Statehood Act, 72 Stat. 343, makes applicable to Alaska the SLA's grant of rights to other States, § 4 of that same Act, 72 Stat. 339, required the State to "forever disclaim all right and title . . . to any lands or other property (including fishing rights)" of Alaska Natives, which lands and other property "shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe." *See* p. 2, *supra*. Reading these provisions in *pari materia*, it cannot seriously be suggested that § 6(m) and the SLA granted that which § 4 expressly reserved. Even if the SLA had the meaning the State ascribes to it, the Statehood Act's reservation of "property (including fishing rights)" of Alaska Natives plainly precludes those property rights from passing to the State under the SLA. Those rights were kept by Congress for future disposition, such as that made in ANILCA.

But the State is also mistaken in urging that the SLA relinquished the federal government's proprietary right in reserved waters. As noted earlier, when Congress sets aside public lands it also "reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138 (1976). Federally reserved water is federal property which the federal government can use without compliance with state law. *Winters v. United States*, 207 U.S. 564 (1908). Congress has plenary authority under the Property Clause to regulate and dispose of such federal property, *Utah Division of State Lands v. United States*, 482 U.S. 193, 201 (1987), and its authority includes the power to control the disposition and use of water on,

under, flowing through or appurtenant to such lands. *United States v. Grand River Dam Authority*, 363 U.S. 229, 235 (1960). No vested interest in the property of the United States may be acquired in the absence of an express grant from Congress and absent that grant or consent, it continues to be held by the United States. *Id.*; *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404-05 (1917). Most importantly, such grants and disposals to the States are not lightly inferred and "nothing passes but what is conveyed in clear and explicit language, – inference being resolved not against but for the Government." *Caldwell v. United States*, 250 U.S. 14, 20 (1919); *see also Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 617 (1978).

The SLA on its face lacks the requisite "clear and explicit" language necessary to relinquish the federal government's proprietary rights in reserved waters. Nowhere in the Act are reserved waters expressly mentioned, let alone Congress' plenary authority to dispose of public lands or waters. Moreover, it is well established that the SLA created no new rights for the States in their inland navigable waterways beyond that afforded by the equal-footing doctrine. *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 324 (1973); *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 371 n. 4 (1977). The Act "was intended to be merely confirmatory of the State's existing rights in the beds of their navigable waterways." *Bonelli*, 414 U.S. at 324 n. 19.

It is equally well established under the equal-footing doctrine that the admission of a State into the Union does not divest Congress of its plenary control over inland navigable waterways. *Arizona v. California*, 373 U.S. 546, 579-98 (1963) (limiting the equal-footing doctrine to the

beds of navigable waters, not the waters themselves). "[E]ven if the land under navigable water passes to the State, the federal government may still control, develop, and use the waters for its own purposes." *Utah Division of State Lands v. United States*, 482 U.S. 193, 202 (1987).

On numerous occasions this Court has concluded that whatever powers the States acquired over their waters as a result of congressional enactments and admission to the Union, Congress has never intended thereby to relinquish its authority to reserve unappropriated water in the future for use on appurtenant lands withdrawn from the public domain for specific federal purposes. *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 702 (1899); *Winters v. United States*, 207 U.S. 564, 577 (1908); *Arizona v. California*, 373 U.S. 546, 579-98 (1963); *Cappaert v. United States*, 426 U.S. 128, 143-46 (1976); *United States v. New Mexico*, 438 U.S. 696, 698 (1978). Here, this conclusion is only strengthened by Congress' continued reservation of waters in Alaska for various purposes despite the SLA's alleged conveyance of all such interests to the State. *See, e.g.*, Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271, 1284(c), Pub. L. No. 90-542 (Oct. 2, 1968), 82 Stat. 917.[13]

Equally bereft of merit is the State's claim that the SLA's transfer to the States of management authority over natural resources precludes the federal government from exercising regulatory authority over fish and wildlife in

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[13] Twenty-six rivers in Alaska have been specifically reserved under the Wild and Scenic Rivers Act, "to be administered by the Secretary of Interior." 16 U.S.C. §§ 1274(25)-(50).

navigable waters. Pet. 18. This Court considered and rejected this very argument in *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 283-84 (1977).[14]

5. Finally, even if the Ninth Circuit had committed some error in its holding that ANILCA's "public lands" definition encompasses federal reserved waters, the court's judgment in this case must still stand because the navigational servitude of the United States constitutes an interest in navigable waters owned by the United States, making all navigable waters in Alaska public lands for ANILCA purposes.[15] Indeed, if the Ninth Circuit erred in any respect, it erred in rejecting the district court's well-reasoned conclusion (Pet. Supp. App. 34-43) that the navigational servitude is an interest of the United States in

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[14] Consistent with the SLA's savings clause, Congress has repeatedly exercised its reserved power to regulate fish and wildlife in navigable waters. *See, e.g.*, the Fur Seal Act of 1966 (80 Stat. 1091; 16 U.S.C. § 1151), the Endangered Species Act of 1973 (87 Stat. 884; 16 U.S.C. §§ 1531-1543), the Marine Mammal Protection Act of 1972 (86 Stat. 1027; 16 U.S.C. §§ 1361-1407), the Fishery Conservation and Management Act of 1976 (90 Stat. 331; 16 U.S.C. §§ 1801-1882), and the Federal Aid in Fish Restoration Act (64 Stat. 430; 16 U.S.C. §§ 777-777K). Significantly, Title VIII of ANILCA acknowledges these Acts as "governing the conservation or protection of fish and wildlife." § 815(4), 94 Stat. at 2429, 16 U.S.C. § 3125(4). Each of these Acts would be reduced to a nullity under Alaska's reading of the SLA.

[15] The subsistence fishery of private respondents Katie John, et al., is conducted in navigable waters within a national park that are both federally reserved and subject to the navigational servitude. Private respondents are thus entitled to the ANILCA subsistence priority if those waters are public lands by virtue either of being reserved waters or being within the navigational servitude.

the navigable waters of Alaska that falls within ANILCA's definition of "public lands."[16]

## II.

## THERE IS NEITHER A "JURISDICTIONAL CRISIS" NOR A CONFLICT IN DECISIONAL LAW WARRANTING THE EXERCISE OF THIS COURT'S DISCRETIONARY JURISDICTION

Alaska's claim (Pet. 8-13) of a "jurisdictional crisis" rests upon a mischaracterization of the effect of the Alaska Supreme Court's "conflicting" decision in *Totemoff v. State*, 905 P.2d 954 (1995) (Pet. App. 25). Contrary to petitioner's assertions, Alaska is not "bound to follow" (Pet. 9) the *Totemoff* dictum, for the simple reason that the state court has not purported to direct the State to do anything, much less contravene a federal court order entered in a case in which Alaska is a voluntary party. The "conflicting" portion of the Alaska Supreme Court's *Totemoff* opinion, moreover, is entirely manufactured. The *Totemoff* case itself (a criminal prosecution for "spotlighting deer") presented no issue of whether federal reserved

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[16] In its rather perfunctory rejection of the district court's holding on this point, the Ninth Circuit relied on its earlier summary conclusion in *City of Angoon v. Hodel*, 803 F.2d 1016, 1027 n.6 (1986), *cert. denied*, 484 U.S. 870 (1987), that the United States does not hold "title" to the navigational servitude. 72 F.3d at 702-03 (Pet. App. 9-10). But the *Angoon* decision predated this Court's decision in *Amoco Production Co. v. Village of Gambell*, 480 U.S, 531, 548 n. 15 (1987), in which the Court made it clear that technical fee title is not the *sine qua non* of ANILCA's "public lands" definition. *See* p. 17, *supra*.

waters constitute "public lands." The only waters arguably involved in that case were the marine waters of the territorial sea, as to which the reserved-water-rights doctrine has no application. The Alaska court reached far beyond the controversy before it – the court even ignored a stipulation by the State to be bound by the outcome of this federal litigation – for the sole apparent purpose of orchestrating a "conflict" with the Ninth Circuit that would induce this Court to grant review here.[17] Fairly assessed, the *Totemoff* decision creates no more of a "conflict" for purposes of this Court's Rule 10 than would an "opinion" of the Alaska Attorney General or, for that matter, the State's briefing in this case. Even the dissenting judge below (72 F.3d at 704-08 (Pet. App. 14-24)) ignored the Alaska court's *Totemoff* decision, although the State had brought the decision to the Ninth Circuit's attention in support of its petition for rehearing. *See* App. at 6a, *infra*.

1. As shown in the Statement (pp. 10-11, *supra*), Alaska has been subject to a dual system of fish and wildlife management since July 1, 1990: one established by the Secretary to govern subsistence hunting and fishing on the public lands; the other established by the State to govern all hunting and fishing on non-public lands, as well as non-subsistence hunting and fishing on public lands (to the extent not pre-empted by federal law). As the *Totemoff* case graphically illustrates, Alaskan subsistence users are already subject to one or both of two distinct management regimes, depending on whether

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[17] The procedural history of the *Totemoff* litigation is set forth in the Appendix, pp. 1a-7a, *infra*.

their hunting and fishing activities take place on or off the public lands (or on both public and non-public lands). If the State's prediction of "jurisdictional chaos" (Pet. 22) resulting from the judgment below had any merit, such chaos would already exist – and there would be nothing that this Court could do about it. Not only has the State abandoned any challenge to the Secretary's authority to implement a federal subsistence program for the public lands (*see* p. 13, *supra*), such a bifurcated management scheme is expressly required by Title VIII, and results altogether from the State's inability or unwillingness to comply with the conditions imposed by Congress. *See* pp. 6-8, *supra*. All that is involved in this case is the proper identification of "public lands" as defined in ANILCA. Regardless of the outcome here, some two-thirds of Alaska will continue to be regulated by the federal subsistence-management program. Whatever "chaos" (or lack of it) such a system produces will continue.

The State, in all events, has greatly exaggerated the consequences of dual management.[18] For more than five

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[18] Typical of the State's penchant for overstatement is its reliance on the Prince William Sound herring sac roe fishery as an example of the impossible situation created by the court below. Pet. 12. This fishery takes place exclusively in the marine waters of the territorial sea, not in inland rivers and streams (to which these fish do not migrate). Nothing in the Ninth Circuit's holding respecting federal reserved waters will have any effect of any kind on the State's management of this fishery.

Similarly beside the point is the State's emphasis (Pet. 13) on the claim of private respondents and others that the Secretary has the authority and obligation to regulate the uses of migratory species off the public lands in order to assure the priority for subsistence uses of those species when they move

years subsistence users of highly migratory species such as moose and caribou, and the animals themselves (which move on and off the public lands at will), have been subject to the dual federal/state management regime. *See also* Pet. 11 n.4 (describing different federal and state regulations governing subsistence hunting from boats). This has not resulted in chaos. Moreover, the Alaska Supreme Court (and to a lesser extent the State, *see* Pet. 20-21 & note 8) asserts that a "substantial" portion of the State's navigable waters are already properly regulated by the federal program, and that "some subsistence fishing takes place in non-navigable waters which are 'public lands.' " *Totemoff*, 905 P.2d at 968 & n.7 (Pet. App. 53). Although there certainly have been a few "conflicts" over the years, there is no evidence that either the people or the fish and wildlife of Alaska have been harmed. Again, however, to the extent this situation is deemed undesirable from the standpoint of good public policy, the State holds the key to the solution: comply with the conditions prescribed by § 805(d) of ANILCA, 16 U.S.C. § 3115(d). If that solution is not desirable, the State should be petitioning Congress, not this Court.

2. The State also errs in its persistent attempts to portray the Alaska court's *Totemoff* decision as *compelling* the State to defy the Ninth Circuit's judgment. The Alaska court did no such thing. *Totemoff* was a criminal case involving a subsistence hunter who was charged under state law with using a spotlight to aid in the

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on to the public lands. This claim has not yet been decided, but it has nothing to do with the scope of "public lands."

shooting of a deer on a federal island in Prince William Sound from a boat situated in marine waters. *Totemoff*, 905 P.2d at 957 (Pet. App. 25). The principal issue was whether the State's criminal jurisdiction was pre-empted by ANILCA or implementing federal regulations. The Alaska Supreme Court held that ANILCA did not pre-empt the field of subsistence regulation on public lands, and that in that case there was no actual conflict between state regulation and any provision of ANILCA or a federal regulation. *Id.* at 958-61 (Pet. App. 26-36).[19] These holdings were dispositive of the issue of state jurisdiction. Nonetheless, the court proceeded, on the *arguendo* assumption that these holdings were unsound, to pursue the theory that the State would still have jurisdiction "if ANILCA does not apply to the navigable waters from which Totemoff shined his spotlight at the deer." *Id.* at 961 (Pet. App. 36). But as previously noted, the "navigable waters" in question were part of the territorial sea and the Ninth Circuit below had already foreclosed the possibility that the marginal sea would be subject to the federal subsistence program by rejecting the district court's holding that the navigational servitude constituted "public lands." Rather than simply note that fact, or even express its independent agreement with the Ninth Circuit on the point, the Alaska court reached out to argue that the federal court erred in concluding that

---

[19] The *Totemoff* court's construction of the pre-emptive scope of Title VIII of ANILCA *would* appear to conflict with prior decisions of the Ninth Circuit. *See United States v. Alexander*, 938 F.2d 942 (9th Cir. 1991); *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 313 n.1 (9th Cir. 1988), *cert. denied*, 491 U.S. 905 (1989). But that issue is not in any way involved in this case.

federally reserved waters are included within ANILCA's definition of "public lands." *Id.* at 962-68 (Pet. App. 36-53). The court did this without the benefit of adversarial briefing, despite the State's stipulation to be bound by the outcome in federal court, and even though the reserved-waters issue had no bearing on the case at hand. *See* App. at 2a-7a, *infra*. This is the purest form of *obiter dictum*, engaged in for no apparent purpose other than to manipulate this Court's certiorari jurisdiction. The Court should decline the gambit.

In any event, there is nothing in the *Totemoff* case that requires the State to do anything. The State is a party to the instant case, and it is bound by the decision below. That judgment directs the Secretary to identify federally reserved inland waters and to extend ANILCA's protection to subsistence fishing by rural Alaska residents on those waters. "Jurisdictional chaos" most certainly will not ensue. Alaska will continue to regulate sport and commercial fisheries in those (and all other) waters in the State; only to the extent that those non-subsistence fisheries deprive rural subsistence users of their customary and traditional fishing opportunities on the public lands will State regulation be subject to pre-emption – as it already is with respect to the majority of subsistence hunting and some subsistence fishing.[20]

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[20] The Alaska Supreme Court has acknowledged that any federal regulations that actually conflict with State regulations will pre-empt the State regulations. *Totemoff*, 905 P.2d at 960-61 (Pet. App. 32-36)

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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# APPENDIX

## CHRONOLOGY OF THE ALASKA SUPREME COURT'S DISPOSITION IN *TOTEMOFF v. STATE*

**23 December 1993,** *Totemoff v. State*, No. A-4276, 866 P.2d 125 (Alaska App.). The Alaska Court of Appeals, while upholding the trial court's finding of fact that Totemoff's alleged game violations (spotlighting deer) occurred on federal public lands (*id.* at 126 n.3), also upheld his conviction on the ground that the State's concurrent jurisdiction over federal lands was not generally pre-empted by ANILCA, and that there was no actual conflict between the applicable State and federal regulations. (Totemoff was charged with taking deer on Naked Island (federally owned) in Prince William Sound with the aid of a spotlight from a boat in the territorial sea.) The Court of Appeals did not address any *Katie John/ Alaska v. Babbitt* issue, and indeed did not even mention those pending federal cases, inasmuch as the State's Brief of Appellees (2 Feb. 1993), at 12 n.9, had urged the court to abstain from deciding any of those issues in deference to their ongoing adjudication in the federal-court cases in which the State was a party, one of which (*Alaska v. Babbitt*) it had initiated.

**11 February 1994.** Totemoff filed his Petition for Hearing, No. S-6151, asking the Alaska Supreme Court to review the *Totemoff* decision of the court of appeals. The petition raised no *Katie John* issue, and alluded to none, in view of the fact that both lower courts had found as fact that the offense alleged by the State occurred on federal land. The State's Response and Opposition to Petition for Hearing (3 March 1994) likewise made no mention of any *Katie John* issue.

**30 March 1994.** Chief Federal District Judge Holland filed his decision in the consolidated cases of *Katie John v. United States* (1990) and *Alaska v. Babbitt* (1992) on the issues of "who" should be affording the ANILCA subsistence priority on federal lands and waters (the federal government or the State) and "where" (on any or all navigable waters) beyond federal fast-lands that priority extended. Judge Holland held that the federal government had properly assumed subsistence-management authority over the public lands in 1990, and that the priority extends to all navigable waters in Alaska by reason of the navigational servitude of the United States.

**18 April 1994,** *Totemoff v. State,* No. S-6151. The Alaska Supreme Court entered an order granting the *Totemoff* petition for review and specifying three issues to be addressed by the parties:

> A. Whether the prosecution is "subject to a defense that spotlighting is a 'customary and traditional' method of taking game which is protected under ANILCA?"
>
> B. "If the answer to the above question is in the affirmative, is there a sufficient non-federal nexus in this case to sustain the conviction solely under Alaska law?"
>
> C. "With respect to question B above, is the State precluded by the [*Katie John*] decision from contending that tidelands or lands under navigable water within the three-mile limit are not subject to ANILCA?"

Although the latter two questions related to *Katie John,* they were to be answered *only* if the first question (whether ANILCA protects customary and traditional

*methods* of taking wildlife) was answered in the affirmative. No issue was raised by either the Court or the parties pertaining to federally reserved waters.

**17 May 1994,** *Katie John & Alaska v. Babbitt.* The Ninth Circuit granted the petitions of the State and the federal government for leave to take an interlocutory appeal from Judge Holland's *Katie John* decision.

**28 June 1994,** *Totemoff v. State,* No. S-6151. Counsel for the State and Totemoff filed with the Alaska Supreme Court a "Stipulated Request for Stay" asking the court to stay further proceedings in *Totemoff* until the Ninth Circuit had decided the State's appeal in *Katie John* and until any ensuing petitions for review by this Court had been resolved. In addition to noting the status of the *Katie John* appeal, the State and Totemoff stated: "Despite the fact that *John* may not reach final resolution in federal court until sometime in 1995 and possibly later, both parties stipulate and agree that this Court should stay this proceeding until these critical issues are finally resolved in federal court."

**5 July 1994,** *Totemoff v. State,* No. S-6151. The Alaska Supreme Court entered an order granting the parties' request to stay all proceedings in *Totemoff* "pending a decision by the federal court." The court directed the parties "to advise the clerk as soon as a decision is made by the federal court."

**8 February 1995.** The Ninth Circuit heard oral argument on the remaining ("where") issues in *Katie John* and *Alaska v. Babbitt* (i.e., whether ANILCA's subsistence priority applies to navigable waters by virtue of either the navigational servitude or federal reserved water rights).

**17 February 1995,** *Totemoff v. State,* No. S-6151. Although no party had asked it to do anything, the Alaska Supreme Court *sua sponte* issued an order vacating the 5 July 1994 stay and directing that briefing proceed forthwith on an expedited basis. Totemoff filed his brief on 31 March, and the State filed its brief on 20 April. Neither brief contained any argument on the issue of whether federal reserved water rights constitute "public lands" under ANILCA. The only mention of the issue was in the State's Brief of Respondent, at 23 n.10, where the State pointed out that the reserved-water-rights doctrine can have no application to the ocean.

**20 April 1995,** *Katie John v. United States & Alaska v. Babbitt,* 54 F.3d 549 (9th Cir.) (9th Cir. Nos. 94-35480 & -35481). The Ninth Circuit decided the remaining *Katie John* issues, holding that the navigational servitude does not make all of Alaska's navigable waters federal public lands to which ANILCA's priority for subsistence fishing therefore applies, but that federally reserved waters appurtenant to congressional and executive reservations of the public domain in Alaska do constitute such "public lands," that is, "lands, waters and interests therein the title to which is in the United States." That same day the State filed a copy of the Ninth Circuit's decision with the Alaska Supreme Court, along with a letter asserting that the Ninth Circuit's rejection of the navigational servitude as a basis for ANILCA jurisdiction disposed of any possibility that Totemoff's boat was on public lands, since federal reserved water rights apply only to inland waters. (Totemoff then moved to strike the cover letter because it contained argument.)

**24 May 1995,** *Totemoff v. State,* No. S-6151. The Alaska Supreme Court entered an order striking the State's cover letter, but allowing the State to file "a short supplemental brief" concerning the Ninth Circuit's decision within three days, and allowing Totemoff to file a short response within five days thereafter. The State seized the opportunity to file a 15-page brief in 26 May contending that the Ninth Circuit's decision was wrong about the nature and scope of federally reserved waters in relation to ANILCA's definition of public lands. In his responsive brief filed on 31 May, defendant Totemoff (whom the two lower courts had found to have committed the offense charged by the State on federal fast-lands) argued that the court had no business reviewing the Ninth Circuit's decision, which did not affect him either way and to which the State had voluntarily bound itself (and in any event was bound by the common law of collateral estoppel); he also argued that the court should not reach out to decide the issue in the absence of the federal government being a party to the case. Totemoff made no effort to brief the correctness of the Ninth Circuit's decision which he deemed immaterial to his case.

**8 June 1995.** Although no one had asked for an expedited hearing, much less accelerated briefing (Totemoff had received no jail time), the Alaska Supreme Court scheduled and heard oral argument shortly after the last supplemental brief was filed.

**7 August 1995,** *Totemoff v. State,* No. S-6151, Slip Opinion No. 4236 (Alaska). Within an unprecedented

sixty days of oral argument,[1] the Alaska Supreme Court filed its "opinion," reaching out and (unnecessarily) deciding that the Ninth Circuit had committed error with respect to a number of federal questions related to federally reserved waters that had not been subjected to adversarial briefing and argument in the *Totemoff* case – and that were not even presented by the controversy at hand. The court first held that ANILCA did not pre-empt State criminal jurisdiction in the context at bar, in part because it did not protect hunting methods. Slip op. at 3-12. Although that holding was dispositive, the court then proceeded at length to argue that the Ninth Circuit was wrong in its reserved-waters ruling. Slip op. at 12-31.

**8 August 1995,** *Katie John v. United States & Alaska v. Babbitt*, 9th Cir. Nos. 94-35480 & -35481. The Ninth Circuit panel entered an order denying the State's petition for rehearing and rejecting its suggestion for rehearing *en banc*. Pet. App. 55. (On this same day, the State filed with the Ninth Circuit a copy of the Alaska Supreme Court's *Totemoff* opinion as supplemental authority in support of the petition for rehearing.)

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[1] The Alaska Attorney General publicly speculated that the Court was trying to lend the State a hand in its federal *Katie John* litigation:

> My suspicion is that the court wanted to get the opinion out as quickly as possible so the (federal appeals court) would have a chance to see it before it ruled on the reconsideration issue. Unfortunately, we didn't beat the clock.

*Anchorage Daily News*, p. A-1, 9 August 1995.

**10 August 1995,** *Katie John v. United States & Alaska v. Babbitt*, 9th Cir. Nos. 94-35480 & -35481. The Ninth Circuit entered an order withholding issuance of its mandate.

**19 August 1995.** Full jurisdiction over the *Totemoff* case returned to the State trial court pursuant to ALASKA RULE OF APPELLATE PROCEDURE 507.

**30 August 1995,** *Katie John v. United States & Alaska v. Babbitt*, 9th Cir. Nos. 94-35480 & -35481. The Ninth Circuit entered an order requesting the parties to submit supplemental five-page letter briefs addressing the "public lands" analysis in the Alaska Supreme Court's *Totemoff* opinion of 7 August.

**20 October 1995,** *Totemoff v. State*, No. S-6151, Corrected Slip Opinion No. 4276, 905 P.2d 954 (Alaska) (Pet. App. 25). Although jurisdiction over the case had long since returned to the trial court, the Alaska Supreme Court *sua sponte* entered an order withdrawing its 7 August opinion and replacing it with a "corrected" opinion. The order explained that "the corrections are found in the last full paragraph on page 18 and in the first full paragraph on page 26." Page 8a, *infra*. (These paragraphs, as they appeared in the original 7 August opinion are set forth at pp. 8a-9a, *infra*. *Compare with* Pet. App. 41 & 49 (905 P.2d at 963 & 967).)[2]

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[2] According to defendant Totemoff's petition for rehearing, filed with the Alaska Supreme Court on 30 October 1995, the "corrected" opinion was the product of the court (even though it no longer had jurisdiction of the case) having obtained, *ex parte* from counsel for the State, copies of the letter briefs the federal-court parties had filed with the Ninth Circuit.

## ORDER FILED 20 OCTOBER 1995 IN *TOTEMOFF v. STATE* (ALASKA SUPREME COURT NO. S-6151)

Before: Compton, Chief Justice, Rabinowitz, Matthews, Moore, and Eastaugh, Justices.

IT IS ORDERED, SUA SPONTE:

1. Opinion No. 4236 issued in this case on August 7, 1995, is WITHDRAWN.

2. Corrected Opinion No. 4276 is issued today in its place. The corrections are found in the last full paragraph on page 18 and in the first full paragraph on page 26.

Entered by direction of the court at Anchorage, Alaska on October 20, 1995.

CLERK OF THE
SUPREME COURT

/s/ Jan Hansen
JAN HANSEN

---

## EXCERPTS FROM PAGES 18 AND 26 OF SLIP OP. NO. 4236 FILED 7 AUGUST 1995 IN *TOTEMOFF v. STATE* (ALASKA SUPREME COURT NO. S-6151)

* * * *

For a number of reasons, we find that neither the navigational servitude nor reserved water rights bring navigable waters within ANILCA's definition of "public lands," and that the federal government has no authority

to regulate hunting and fishing in Alaska's navigable waters. [Slip op. at 18.]

* * * *

Fifth, the navigational servitude is derived from the Commerce Clause, *see Cherokee Nation*, 480 U.S. at 704, and the power to reserve water rights comes from the Commerce and Property Clauses. *Cappaert*, 426 U.S. at 138. Neither of these clauses gives Congress the authority to regulate subsistence hunting and fishing on state land or water. *Cf. United States v. Lopez*, 115 S. Ct. 1624 (1995) (Commerce Clause does not give Congress authority to ban possession of firearms in school zones). Thus, neither the navigational servitude power to regulate for navigation purposes nor the power to reserve water rights can grant the federal government jurisdiction to manage hunting and fishing in navigable waters. The two powers are over navigation and water, not fish and game. [Slip op. at 26.]

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(5)

Supreme Court, U.S.
FILED
JAN 5 1996
CLERK

No. 95-1084

In The

# Supreme Court of the United States

October Term, 1995

STATE OF ALASKA,

*Petitioner,*

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, KATIE JOHN, et al.,

*Respondents.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

| | |
|---|---|
| KATIE JOHN, et al., Plaintiffs, vs. UNITED STATES OF AMERICA, et al., Defendants. | No. A90-0484-CV(HRH) Consolidated with No. A92-0264-CV (HRH) |
| STATE OF ALASKA, Plaintiff, vs. BRUCE BABBITT, Secretary of the Interior, et al., Defendants. | DECISION (Filed Mar. 30, 1994) |

## Introduction

The above consolidated cases are part of a group of cases under joint management,[1] all of which raise important issues concerning the interpretation and application of Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA). 16 U.S.C. §§ 3111-3126. During

[1] The jointly managed cases, in addition to those captioned above, are *Kluti Kaah Native Village of Copper Center v. State of Alaska*, No. A90-0004-CV, *Fish & Game Fund v. State of Alaska Bd. of Fisheries*, No. A92-0443-CV, *Peratrovich v. United States*, No. A92-0734-CV, *Native Village of Stevens v. McVee*, No. A92-0567-CV, and *Native Village of Quinhagak v. United States*, No. A93-0023-CV.

consultation with counsel for all of the parties in the jointly managed cases, a consensus was reached regarding the prioritizing of two issues to be decided by the court in these cases. These issues are: who is entitled to manage fish and game within Alaska for purposes of ANILCA, and where does ANILCA apply?

## Background

Effective December 18, 1971, Congress adopted the Alaska Native Claims Settlement Act (ANCSA). Pub. L. No. 92-203 (85 Stat. 688).[2] Section 17 (d)(2)[3] of ANCSA made provision for the withdrawal from all forms of appropriation of 80 million acres of unreserved public lands in the State of Alaska for possible addition to or creation of national parks and the like. Section 17 (d)(2)(A). The Secretary of the Interior was required to make periodic recommendations to Congress with respect to such lands, Section (d)(2)(C), and, by Section (d)(2)(D), Congress had five years within which to act upon the Secretary's recommendations. Not until December 2, 1980,[4] did Congress finally adopt the "(d)(2)" lands bill.

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[2] 43 U.S.C. §§ 1601-1629a.

[3] 43 U.S.C. § 1616(d)(2).

[4] Plainly Congress did not complete its work on the (d)(2) lands issue within the five years Congress originally gave itself to accomplish this chore. When the 95th Congress adjourned in 1978 without adopting an Alaska lands bill, the Secretaries of the Interior and Agriculture exercised withdrawal authority which they possessed under Section 204(b) and (e) of the Federal Land Policy & Management Act to make new withdrawals, thus preserving the availability of land for (d)(2) legislation. The President also withdrew substantial additional

Pub. L. No. 96-487, (94 Stat. 2374).[5] Adopting the (d)(2) lands bill was not easy. The matter was under consideration by Congress during three presidential administrations and five sessions of Congress.

Through Title VIII of ANILCA, Congress addressed the important question of how all public lands, not just those in various management systems, should be used. More particularly, Title VIII embodied a congressional decision that those who chose to should have a right to continue to live off the land – to hunt and fish at will for sustenance. Congress found and declared in Section 801 of ANILCA[6] that:

> (1) the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence;
>
> (2) the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses;

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acreage by proclamation for addition to national monuments. But for this action, the lands in question would have become available to selection by the State of Alaska under the Statehood Act or Alaska Native groups under ANCSA.

[5] 16 U.S.C. § 3101, *et seq.*

[6] 16 U.S.C. § 3111.

(3) continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened by the increasing population of Alaska, with resultant pressure on subsistence resources, by sudden decline in the populations of some wildlife species which are crucial subsistence resources, by increased accessibility of remote areas containing subsistence resources, and by taking of fish and wildlife in a manner inconsistent with recognized principles of fish and wildlife management;

(4) in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1601 et seq.] and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents; and

(5) the national interest in the proper regulation, protection, and conservation of fish and wildlife on the public lands in Alaska and the continuation of the opportunity for a subsistence way of life by residents of rural Alaska require that an administrative structure be established for the purpose of enabling rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses on the public lands in Alaska.

In Section 802 of ANILCA,[7] Congress further declared it to be national policy that:

> (1) consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands; consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes of each unit established, designated, or expanded by or pursuant to titles II through VII of this Act, the purpose of this subchapter is to provide the opportunity for rural residents engaged in a subsistence way of life to do so;
>
> (2) nonwasteful subsistence uses of fish and wildlife and other renewable resources shall be the priority consumptive uses of all such resources on the public lands of Alaska when it is necessary to restrict taking in order to assure the continued viability of a fish or wildlife population or the continuation of subsistence uses of such population, the taking of such population for nonwasteful subsistence uses shall be given preference on the public lands over other consumptive uses; and
>
> (3) except as otherwise provided by this Act or other Federal laws, Federal land managing agencies, in managing subsistence activities on the public lands and in protecting the continued viability of all wild renewable resources in

---

[7] 16 U.S.C. § 3112.

> Alaska, shall cooperate with adjacent landowners and land managers, including Native Corporations, appropriate State and Federal agencies, and other nations.

After defining the term "subsistence uses",[8] ANILCA Section 804 established non-wasteful subsistence uses as having "priority" over the taking on public lands of fish and wildlife for other purposes.

With this background, we come to the statutory provision which is the focal point of the question: who is entitled to regulate the taking of fish and game on public lands in Alaska for subsistence purposes? ANILCA Section 805(d)[9] provides that:

> The Secretary shall not implement subsections (a), (b), and (c) of this section if within one year from December 2, 1980, the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, sections 3113, 3114, and 3115, of this title, such laws, unless and until repealed, shall supersede such sections insofar as such sections govern State responsibility pursuant to this subchapter for the taking of fish and wildlife on the public lands for subsistence uses. . . .

The State of Alaska enacted such a law. Indeed, the State of Alaska was so anxious to maintain its role as the sole regulator of fish and game in the state that it had enacted a subsistence law of its own two years before

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[8] ANILCA Section 803, 16 U.S.C. § 3113.

[9] 16 U.S.C. § 3115(d).

Congress finished the business of fine-tuning and enacting a federal subsistence law, Title VIII of ANILCA.[10] In due course, the Secretary determined that the State of Alaska was in compliance with ANILCA such that state law superseded federal subsistence law. As a consequence, the Secretary was not required to take action and there was no controversy over his role. It is undisputed that during this phase of the implementation of Title VIII of ANILCA, the Secretary's role was to monitor state subsistence activity, ANILCA Section 806,[11] and to carry on his other "closure and other administrative authority over the public lands[.]" ANILCA Section 805(c).[12]

By the mid-1980s, implementation of the state subsistence law for the benefit of rural Alaskans was in full swing. Not surprisingly, there was litigation. The State of Alaska had failed to provide plaintiff Katie John and

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[10] Ch. 151, Session Laws of Alaska, 1978. Sections (4) and (5) were the main operative provisions of this state act. They were codified as AS 16.05.251 and .255 (1978). There were difficulties with this initial act, for it was adopted by the state legislature before Congress had injected the "rural Alaska resident" concept into the preference afforded for subsistence uses of fish and wildlife into ANILCA. ANILCA Section 803, 16 U.S.C. § 3113. This situation is not relevant to this case, but is described in greater detail in an earlier decision of this court. *Bobby v. State of Alaska*, 718 F. Supp. 764 (D. Alaska 1989).

[11] 16 U.S.C. § 3116.

[12] 16 U.S.C. § 3115(c). The Secretary's closure authority is contained in ANILCA Section 816, 16 U.S.C. § 3126. The Secretary's "other" administrative authority is generally taken to have reference to the Secretary's power to manage all other uses of public lands such that appropriate habitat is available for fish and wildlife. ANILCA Section 810, 16 U.S.C. § 3120.

others with an opportunity to pursue their traditional fishing activities at a site known as Batzulnetas. In 1985, Katie John filed suit in this court, seeking enforcement of her subsistence rights. In this regard, Congress expressly provided for district court jurisdiction over the State as regards its implementation of ANILCA. ANILCA Section 807(a).[13] This was but one of a number of similar cases, some involving fisheries, others involving game.

From the court's perspective, the state subsistence program was working, albeit more slowly than rural Alaskans would have preferred. There were substantial legal difficulties, especially over the concept of what constituted "rural" Alaska. *Kenaitze Indian Tribe v. State of Alaska*, 860 F.2d 312 (9th Cir. 1988), *cert. denied*, 491 U.S. 905, 109 S. Ct. 3187 (1989). However, the court is convinced that the state subsistence program could and would have succeeded but for the discovery of a constitutional flaw. In 1989 (a rehearing was denied in March of 1990), the Alaska Supreme Court decided *McDowell v. State*, 785 P.2d 1 (Alaska 1989). In that case, the plaintiff successfully challenged the State subsistence program on the theory that the preference for rural Alaskans was unconstitutional. In this regard, the Alaska Supreme Court held:

> [T]he requirement contained in the 1986 subsistence statute, that one must reside in a rural area in order to participate in subsistence hunting and fishing, violates sections 3, 15, and 17 of article VIII of the Alaska Constitution.

*McDowell*, 785 P.2d at 9.

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[13] 16 U.S.C. § 3117(a).

In consideration of the fact that the Alaska Legislature would be in the session in the spring and early summer of 1990, the State of Alaska sought and obtained a stay of the operative effect of the *McDowell* decision. The Alaska Legislature failed to resolve the dilemma posed by the fact that Title VIII of ANILCA absolutely required a rural limitation in order for Alaska's subsistence law to qualify as a substitute for the federal subsistence scheme, whereas the Alaska Constitution prohibited such a residency requirement. Owing to the seriousness of this constitutional dilemma, the governor of the State of Alaska convened a special session of the legislature to take up the subsistence problem in June of 1990. Like the general session, the special session failed to find a solution to the problem.

In the meantime, the State of Alaska proceeded in the state superior court to obtain a determination of whether the exclusion of the rural preference provision of Alaska's subsistence law vitiated the entire state law or was severable. On June 20, 1990, the superior court ruled that the rural limitation was severable from the remaining portions of Alaska's subsistence law, and that the remainder of AS 16.05.258 was viable.

In the meantime, the Secretary, anticipating that he would be called upon to implement ANILCA as to federal lands, took action to promulgate temporary regulations for subsistence hunting and fishing in the State of Alaska. Summarizing his regulatory action, the Secretary stated:

> This rule provides temporary regulations implementing the subsistence priority for rural residents of Alaska under Title VIII of the Alaska

> National Interest Lands Conservation Act (ANILCA) of 1980. The Alaska Supreme Court recently ruled that the law used by the State of Alaska to provide the subsistence priority required by Title VIII violated the Alaska Constitution. The court's action placed the State out of compliance with Title VIII. Since the State has been unable to return to compliance with Title VIII, the Federal government is required to take over the implementation of Title VIII on public lands.

55 Fed. Reg. 27,114 (June 29, 1990). The Secretary's regulations became effective July 1, 1990, the date the *McDowell* decision was to be effective. Citing the shortness of time available for deliberation and the possibility for "chaos" if the State were able to reinstitute its program, the Secretary in substance adopted the former state subsistence hunting and fishing program. *Id.* The Secretary's implicit wish that the State would find a solution to its constitutional problem was not, nor has it yet been, fulfilled. In due course, the temporary regulations were supplanted by permanent regulations. These permanent regulations, among other things, created the Federal Subsistence Board and invested it with authority to adopt regulations for the day-to-day management of subsistence hunting and fishing on public lands in Alaska. 57 Fed. Reg. 22,940 (May 29, 1992).

## I.

## Who is Entitled to Manage Fish and Game within Alaska for Purposes of ANILCA?

The State has moved for summary judgment on Count III of its first amended complaint in *State of Alaska*

*v. Babbitt [et al.]*, No. A92-0264-CV.[14] The motion is opposed, and the court has invited briefing from the parties to the other jointly managed cases, some of whom have submitted briefs on this issue. Oral argument has been heard and, after further analysis of certain aspects of this portion of the case, the court called for and received supplemental briefing. The State raises the fundamental question: does the Secretary[15] have specific authority to adopt a comprehensive scheme for fish and wildlife management on "public lands" as defined in Section 102 of ANILCA?[16]

There is no disagreement about the fact that the *McDowell* decision abrogated the rural preference provision of the Alaska subsistence law. There is no dispute but that the rural preference is an essential element of the federal program. ANILCA Section 803.[17] The State contends, largely upon Sections 805(a) through (c) and 1314 of ANILCA[18] and its analysis of the legislative history of ANILCA, that Title VIII simply does not vest the Secretary with authority to assume day-to-day management of fish and game for subsistence purposes on public lands. The federal defendants, as well as Katie John and others,

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[14] Clerk's Docket No. 113.

[15] Under ANILCA, the term "Secretary" means the Secretary of the Department of the Interior except as to National Forest System lands, in which case "Secretary" means the Secretary of the Department of Agriculture. ANILCA § 3102(12); 43 U.S.C. § 1618.

[16] 16 U.S.C. § 3102.

[17] 16 U.S.C. § 3113.

[18] 16 U.S.C. §§ 3115(a)-(c) and 3202.

insist that the combination of Title VIII and the *McDowell* decision required the federal government generally, and the Secretary in particular, to assume implementation of Title VIII of ANILCA.

ANILCA Section 803[19] unmistakably and unambiguously establishes a preference in favor of rural Alaskans as regards the taking of fish and wildlife from public lands. Although it is counter-intuitive to think that Congress would enact a law creating such a right and not authorize the Executive Branch to implement it, this contention of the State of Alaska is not without substance. However, for the reasons and upon the authorities discussed below, the court has concluded that unless and until the State of Alaska shall again be in compliance with section 805(d) of ANILCA,[20] the Secretary has the authority to adopt regulations for the purpose of implementing Sections 803,[21] 804,[22] and 805[23] of ANILCA.

ANILCA Section 805(a) requires the Secretary, in consultation with the State, to establish subsistence resource regions and local and regional advisory groups, "[e]xcept as otherwise provided in subsection (d)[.]" The Alaska subsistence law being out of compliance with Title VIII, the Secretary is plainly obligated to establish these subsistence resource regions and appoint local and regional advisory groups.

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[19] 16 U.S.C. § 3113.

[20] 16 U.S.C. § 3115(d).

[21] 16 U.S.C. § 3113.

[22] 16 U.S.C. § 3114.

[23] 16 U.S.C. § 3115.

ANILCA Section 805(b) requires that the Secretary assign staff sufficient to permit the local and regional advisory groups to do their work.

ANILCA Section 805(c) is the provision which is critical to the State's argument. It provides:

> The Secretary, in performing his monitoring responsibility pursuant to section 3116 of this title and in the exercise of his closure and other administrative authority over the public lands, shall consider the report and recommendations of the regional advisory councils concerning the taking of fish and wildlife on the public lands within their respective regions for subsistence uses. The Secretary may choose not to follow any recommendation which he determines is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs. If a recommendation is not adopted by the Secretary, he shall set forth the factual basis and the reasons for his decision.

Section 805(c) speaks of the Secretary's monitoring responsibilities, his power to effect closures of certain lands for subsistence uses (ANILCA Section 816[24]) and his other administrative authorities over public lands, but says not a word about implementing the subsistence preference for rural Alaskans created by Section 803 or the subsistence priority created by Section 804. It is in this context that the State invokes the provisions of ANILCA Section 1314[25] which provide:

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[24] 16 U.S.C. § 3126.

[25] 16 U.S.C. § 3202.

> (a) Nothing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands except as may be provided in [Title VIII of this Act[26]], or to amend the Alaska constitution.
>
> (b) Except as specifically provided otherwise by this Act, nothing in this Act is intended to enlarge or diminish the responsibility and authority of the Secretary over the management of the public lands.

Traditionally in the United States, and Alaska is no exception, the federal government has deferred to state fish and game regulators with respect to the management of fish and game on federal lands. *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1248 (D.C. Cir. 1980). The Alaska Statehood Act[27] made express provision for the transfer of authority to manage fish and game to the State of Alaska after it had established an appropriate system and demonstrated its ability to assume responsibility for such management from the federal, territorial fish and game regulators. It is in this context that the State argues that it is entitled to continue management of fish and game on public lands unless Title VIII of ANILCA provides otherwise. Again, the State's contention is that Title VIII, as discussed above, does not provide otherwise. The State's

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[26] Title VIII of ANILCA was codified as subchapter II of chapter 51, 16 U.S.C. § 3111, *et seq.*

[27] Pub. L.No. 85-508 (72 Stat. 339), effective July 7, 1958.

foregoing position is underscored by the parallel provision of ANILCA Section 1314(b),[28] which serves to maintain the *status quo* as far as the authority of the Secretary.

Count III of the State's amended complaint calls upon the court to review the Secretary's construction of Title VIII of ANILCA. In *Chevron USA, Inc. v. Natural Resource Defense Council*, 467 U.S. 837, 843 (1983), the United States Supreme Court adopted a two-part test for evaluating agency construction of a statute. The court must first determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If, having employed the traditional tools of statutory construction, the court determines that the intent of Congress is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. In such situations, the court owes no particular deference to the administrators. The court must reject a statutory interpretation reached by administrative authorities that is contrary to the clearly expressed intent of Congress. *Id.* at n.9.

If the court determines that Congress has not clearly stated its intention either by the express language of a statute or otherwise – that is, if the court determines that there is a gap in the statute –

> [T]he court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's

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[28] 16 U.S.C. § 3202(b).

> answer is based on a permissible construction of the statute.

*Id.* at 843. The agency construction need not be the only possible interpretation, it must simply be a reasonable one.[29] *Id.* at 844.

It is difficult to square the Secretary's interpretation of Title VIII of ANILCA with the express language of these provisions. It is the Secretary's view that he must step in and implement ANILCA Section 804 following the failure of the state subsistence program implemented under ANILCA Section 805(d).[30] As discussed above, Congress has simply not enacted any express, direct authorization that the Secretary implement the rural preference and subsistence priority if the State does not do so.

As the United States Supreme Court makes clear in *Chevron*, the court may employ "traditional tools of statutory construction"[31] for the purpose of determining congressional intent. The State and the court have looked to the legislative history of ANILCA which is voluminous.[32]

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[29] The reasonableness test applies to agency action to fill statutory gaps which Congress has implicitly left to the agency. Where there is an explicit legislative delegation to the agency, an arbitrary or capricious test applies. No one contends that this is a case of explicit congressional delegation. Indeed, the State would seemingly not concede that there is any gap in this statute.

[30] 16 U.S.C. § 3115(d).

[31] *Chevron*, 467 U.S. at 837 n.9.

[32] This legislative history has been compiled and bound in 41 separate volumes, which take up nine feet of shelf space.

The State provided an initial analysis of legislative history pertinent to the question before the court. The court was not satisfied with this initial analysis and conducted an independent evaluation of the legislative history. That evaluation was the subject of a preliminary order.[33] In this order, the court invited the parties to file supplemental briefs, which have been filed and have been considered by the court.

The court's final appraisal of the legislative history pertinent to the question of whether or not the Secretary has primary authority to implement ANILCA Section 804 in the absence of a state program is contained in an appendix attached to this decision. As detailed in the appendix, Congress started out with the proposition that the Secretary, and he alone, would manage a subsistence hunting and fishing program for rural Alaskans. Through the various legislative sessions, the role of the Secretary was consciously and intentionally reduced, and the role of the State was correspondingly increased. The State accurately points out that Congress expressly rejected a program wholly within the control of the Secretary. It simply does not follow, however, that Congress intended that the State continue day-to-day management of fish and game for subsistence purposes, in the absence of a state law of general application sufficient to supersede ANILCA Sections 803 through 805. *See* ANILCA Section 805(d).[34] The court concludes that Congress unintentionally and inadvertently omitted an express provision

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[33] Order re Motions for Summary Judgment on the "Who" Issue, filed November 22, 1993 (Clerk's Docket No. 163).

[34] 16 U.S.C. § 3115(d).

authorizing the Secretary to implement Section 804 in the absence of a state program.

By ANILCA Section 814,[35] Congress expressly authorized the Secretary to promulgate, "such regulations as are necessary and appropriate to carry out his responsibilities under this [Title]." Congress having unequivocally given the Secretary regulatory authority, he was empowered to fill the statutory gap so as to implement not only the policy contained in ANILCA Section 802,[36] but also effect the substantive preference established by ANILCA Section 803[37] for rural Alaskans.

The final step in the analysis required by *Chevron* involves the question of whether or not the agency decision embodies a reasonable interpretation of the statute. In this instance, the Secretary's interpretation may be the only reasonable one which could follow the State's forced withdrawal from a qualifying subsistence program. Certainly implementation of ANILCA Section 804 by the Secretary through the creation of a Federal Subsistence Board was *a* reasonable response, even if it were not the only possible response to the failure of the state program. The State cannot say that the Board's initial regulations were unreasonable, for the Board in substance adopted the State's pre-*McDowell* subsistence program through temporary regulations. This action provided a smooth transition from state to federal management of the rural subsistence program for public (federal) lands.

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[35] 16 U.S.C. § 3124.

[36] 16 U.S.C. § 3112.

[37] 16 U.S.C. § 3113.

The State has made a number of other arguments in support of its position. One of them is particularly intriguing. The State argues that, despite *McDowell*, it may voluntarily submit to the jurisdiction of this court for purposes of carrying out a qualifying subsistence program as to public (federal) lands. The State seems to argue that it can carry out such a program without doing violence to the Alaska Constitution as applied to subsistence programs in *McDowell* so long as such program is effected through a court decree.[38]

What the State urges is problematic and is rejected for a number of reasons.

Firstly, the State is no longer in compliance with the requirements of Section 805(d),[39] and therefore federal court jurisdiction over any state program is very dubious. The court is unable to identify, and the State has not suggested, the source of power for a state fish and game regulator to take action to implement a rural Alaskan preference. Since *McDowell*, no state law may constitutionally authorize such. Even if that obstacle were overcome, what the State suggests smacks of a violation of the separation of powers doctrine.

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[38] ANILCA Section 807(a), 16 U.S.C. § 3117(a), provides for federal court enforcement of a state subsistence program consistent with ANILCA Section 804, 16 U.S.C. § 3114, in federal court. No doubt for purposes of avoiding Tenth Amendment difficulties, Section 807(a) reiterates that state programs are optional with the state, providing for federal court jurisdiction "if the State has fulfilled the requirements of Section 805(d)."

[39] 16 U.S.C. § 3115(d).

Secondly, the State's proposal carefully avoids suggesting that the State would be enacting regulations. Rather, the State would seemingly have the court provide continuing supervision through court decrees which would serve as the subsistence program. ANILCA Section 805(d)[40] expressly contemplated a state program carried out through a "state rulemaking authority". ANILCA Section 807(a)[41] plainly contemplates court review of that state rule-making, and if the state regulations on a subject are found wanting, there is a requirement for the submission of replacement regulations for court approval and incorporation in a decree. This arrangement vests the court with jurisdiction to provide a standard judicial remedy: review of administrative rule-making. What the State suggests is that the court in substance become the rule-maker.

Thirdly, there is a substantial risk of state court litigation which could seek to prevent the state from doing by indirection what the Alaska Supreme Court has expressly found to be unconstitutional – a rural Alaskan preference. Although this subject was not developed by the parties, it is the view of the court that such a suit would likely be successful.

The court and, judging from the summary and background statements that preceded his temporary regulations,[42] the Secretary viewed the dual federal-state fish and game management situation as undesirable. It would

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[40] 16 U.S.C. § 3115(d).

[41] 16 U.S.C. § 3117(a).

[42] 55 Fed. Reg. 27,114 (June 29, 1990).

be far preferable for there to be a unified, federally-qualified subsistence hunting and fishing program in the State of Alaska. One program would undoubtedly cost less, and would certainly be less complex in its implementation and operation. With that view before it, the court has seriously considered that sometimes situations must get worse before they get better, and a determination that Congress did not expressly (in ANILCA Section 805(a) through (c)) or impliedly authorize the Secretary to establish a subsistence hunting and fishing program in Alaska upon the failure of the state program, would certainly precipitate a crisis. Perhaps such a crisis would motivate either Congress or the state legislature to solve the problem which confronts all of us. However, the clarity of the congressional policy and purpose of ANILCA Title VIII, coupled with the clear grant of general regulatory power to the Secretary, convince the court that the position taken by the Secretary is both authorized and reasonable. The court cannot in good conscience reach the crisis-precipitating decision for which the State argues.

The court concludes that the Secretary, not the State of Alaska, is entitled to manage fish and game on public (federal) lands in Alaska for purposes of Title VIII of ANILCA. The State's motion for partial summary judgment[43] on Count III of its amended complaint is denied; and the court, on its own motion, concludes that the contentions contained in said Count III are without merit and subject to dismissal.

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[43] Clerk's Docket No. 113.

II.

Where Does ANILCA Apply?

The first issue has to do with "who" is entitled to regulate. The second issue addressed by this decision has frequently been referred to by the parties as the "where" issue. Assuming that the Secretary does have jurisdiction over the day-to-day management of fish and game for subsistence purposes, the parties disagree as to what lands are subject to the Secretary's regulation.

In their second amended complaint for declaratory and injunctive relief,[44] plaintiffs Katie John, Doris Charles, and the Village Council of Mentasta (the "plaintiffs") contend for their first cause of action that the waters of Tanada Creek and the Copper River are "public lands" as defined by Section 102[45] of ANILCA. First by temporary regulations (55 Fed. Reg. 27,114 (June 29, 1990)), and, more recently, by permanent regulations (57 Fed. Reg. 22,940 (May 29, 1992)), the Secretary has taken the position that navigable waters within the State of Alaska are not "public lands" for purposes of ANILCA. For purposes of this case, it is undisputed that the fishing site which is the subject of Katie John's complaint is on navigable waters.

The plaintiffs have moved for summary judgment on the "where" or "public lands" issue.[46] The federal defendants have responded with motions to dismiss or, in the

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[44] Clerk's Docket No. 106.

[45] 16 U.S.C. § 3102. For convenience and ease of reference, 16 U.S.C. § 3102 is hereafter referred to as "Section 102".

[46] Clerk's Docket No. 48.

alternative for summary judgment.[47] The State of Alaska, co-defendant with the federal defendants as to the Katie John complaint, also move to dismiss the plaintiff's claim.[48] These motions are all opposed. Here again, the court has invited parties to the jointly managed cases to take a position on the public lands issue, and some have done so. The court has heard oral argument.

## Background

The site which has formed the basis for development of the "where" issue is near a fish camp situated at the confluence of Tanada Creek and the Copper River and is within the boundaries of Wrangell-St. Elias National Park and Preserve. This camp was once the location of a village known as "Batzulnetas". The village was abandoned in the early 1940's but a subsistence fishery continued there for many years.

Tanada Creek is a part of the Copper River system. Approximately 120 known sockeye and other salmon stocks ascend the Copper River system each year. The fish stocks mix with one another, and at a given time some twenty or more stocks may be migrating up the river. The Copper River sockeye stocks are harvested commercially near the mouth of the Copper River.

In 1964, the Alaska Board of Fish and Game closed Batzulnetas to fishing with nets and fishwheels. In 1984, Katie John and Doris Charles submitted a proposal to the

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[47] Clerk's Docket Nos. 2, 17, and 121.

[48] Clerk's Docket Nos. 38 and 124.

Alaska State Board of Fisheries requesting that the Batzulnetas area be opened to subsistence fishing. The proposal was denied. In 1985, plaintiffs filed a law suit against the State (*Katie John v. State of Alaska,* No. A85-0698-CV (D. Alaska) (hereinafter *"Katie John I"*)) under ANILCA Section 807(a).[49] The suit resulted in informal negotiations between the parties and an agreement to allow a limited fishery at Batzulnetas. In 1988, the Alaska Board of Fisheries adopted a regulation that allowed limited fishing at the Batzulnetas site. 5 AAC § 01.647(i).

In 1989, in continuation of *Katie John I,* the plaintiffs sought preliminary relief from the regulation that limited fishing at Batzulnetas. In June of 1989, this court issued a preliminary injunction that allowed full-time fishing at Batzulnetas from June 1 through September 1, or, in the alternative, until 1,000 sockeye were taken. Order, June 6, 1989 (No. A85-0698-CV).

In January of 1990, this court invalidated the 1988 regulation (5 AAC § 01.647(i)) and ordered the Alaska State Board of Fisheries to promulgate regulations that established a subsistence fishing priority at Batzulnetas. Before the State had an opportunity to promulgate such regulations, the Alaska Supreme Court decided *McDowell.*[50] As a result of *McDowell,* the State was no longer in compliance with ANILCA, and the regulation of subsistence fishing on "public lands" in the State of

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[49] 16 U.S.C. § 3117(a).

[50] See discussion at pages 7 to 9 hereof for a more complete discussion of what followed the *McDowell* decision.

Alaska was taken over by the Secretary. In order to quickly fill the regulatory void left by *McDowell*, the Federal Subsistence Board adopted temporary regulations on June 29, 1990. The temporary regulations were essentially the same as the state regulations that this court declared invalid in *Katie John I.*

On September 7, 1990, plaintiffs petitioned the Federal Subsistence Board for reconsideration of the temporary regulations that applied to subsistence fishing at Batzulnetas. After considering plaintiffs' motion for reconsideration, the Federal Subsistence Board concluded that the temporary regulations were not applicable to the Batzulnetas fishery and that management of the fisheries remained with the State. This decision was based upon an administrative determination of the National Park Service that the waters of Tanada Creek and Copper River in the vicinity of Batzulnetas are navigable. The Federal Subsistence Board informed the Plaintiffs that the temporary federal regulations only apply to "public lands"[51] and that navigable waters do not fall within the definition of "public lands". 50 C.F.R. § 100.3(b).

On December 5, 1990, the plaintiffs filed a complaint against the United States of America and the Secretary. The action was again brought pursuant to ANILCA Section 807(a).[52]

Plaintiffs state four causes of action, but only the first and second and the fourth are relevant to the issues now

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[51] ANILCA Section 102, 16 U.S.C. § 3102.

[52] 16 U.S.C. § 3117(a).

before this court.[53] In the first cause of action, plaintiffs allege that the federal defendants are required to provide a subsistence fishery at Batzulnetas and that their refusal to do so is in violation of Title VIII of ANILCA. Plaintiffs base the first cause of action on ANILCA Section 804[54] which provides a priority for the taking of fish and game for non-wasteful subsistence purposes on public lands. Plaintiffs allege that the reserved water rights doctrine and the navigational servitude in Alaska waters provide the United States with an interest in the waters of Tanada Creek and Copper River, and that these waters therefore fall within the definition of "public lands" as defined by ANILCA Section 102.

In the second cause of action, the plaintiffs allege that when the United States set aside land for plaintiffs under the Alaska Native Allotment Act of 1906, it also reserved sufficient water to fulfill the purposes of the allotments. Plaintiffs assert that such reserved water rights are interests to which the United States holds title, and thus presents an alternative reason why the waters of Tanada Creek are public lands.

In the fourth cause of action, the plaintiffs allege that the State of Alaska has no jurisdiction over the waters of

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[53] In the third cause of action, the plaintiffs claim that the federal defendants (through the National Park Service) have precluded the plaintiffs from obtaining reasonable access to Batzulnetas via "the Batzulnetas trail". This issue is not the subject of the pending motions.

[54] 16 U.S.C. § 3114.

Tanada Creek and the Copper River as regards subsistence fishing since they are "public lands" as defined in ANILCA.

Accordingly, the plaintiffs request rulings that the waters of Tanada Creek and the Copper River are "public lands"; that the Secretary's refusal to provide for a subsistence fishery at Batzulnetas is a restriction of a subsistence use, contrary to Title VIII of ANILCA; that the federal defendants be ordered to promulgate regulations that provide for subsistence fishing at Batzulnetas; and that the State of Alaska has no jurisdiction to manage subsistence uses of fish in the waters of Copper River and Tanada Creek.

## What Constitutes "Public Lands" under Title VIII of ANILCA?

ANILCA Section 102 provides a three-tier definition of "public lands":

> As used in this Act . . .
>
> (1) The term "land" means lands, *waters, and interests therein.*
>
> (2) The term "Federal land" means lands the *title to which is in the United States* after December 2, 1980.
>
> (3) The term "public lands" means land situated in Alaska which, after December 2, 1980 . . . are Federal lands. . . .

(Emphasis supplied.)

When the Secretary of the Interior took over management of the subsistence uses of fish and wildlife on public

lands in June of 1990, he issued regulations that excluded all navigable waters in Alaska from the definition of public lands, and thus from the ambit of Title VIII.[55] Plaintiffs' complaint is a direct challenge of this regulation. To resolve this challenge, we must evaluate the Secretary's interpretation of ANILCA Section 102. We follow the procedure and authorities discussed above[56] in doing so.

Congress did not define the terms "interests" or "title" in the definition of "public lands" in ANILCA, nor did it make any reference to the common law doctrines of reserved water rights or navigational servitude. The parties have not unearthed any legislative history indicating that Congress considered these doctrines when it defined the term "public lands". Since Congress has not specifically defined the terms "interests" or "title", the court's first task is to determine what kind of authority Congress gave the federal defendants, as this will fix the degree of deference which the court must give to the federal defendants' interpretation of ANILCA Section 102.

Where the governing statute contains an express delegation of legislative authority over a specific provision,

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[55] The final regulation adopted by the Secretary of the Interior reads:

> (b) The regulations contained in subpart D apply on all public lands including all non-navigable waters located on these lands.

57 Fed. Reg. 22,951 (May 29, 1992); *see also* 50 C.F.R. § 100.3(b). The Secretary of Agriculture adopted identical parallel regulations at 36 C.F.R. § 242.3(b).

[56] See [pages 15 to 17 of supplemental appendix.]

Congress has in effect instructed the agency to engage in a deliberative process requiring the agency to weigh costs, benefits, and other competing interests, and arrive at a value judgment. Hence, judicial review of such legislative determinations is at its narrowest, asking only if the agency action were arbitrary and capricious. *See, Schweiker v. Gray Panthers,* 453 U.S. 34 (1981); *Mercy Hospital of Laredo v. Heckler,* 777 F.2d 1028 (5th Cir. 1985). An express delegation must be clear from the terms of the statute. *See, e.g., Batterton v. Francis,* 432 U.S. 416 (1976) (where the Secretary of Health, Education and Welfare was directed by statute to define the term "unemployment" in a provision of the Social Security Act).

ANILCA contains no such express delegation of legislative authority regarding the definition of "public lands". However, Section 102 contains an implicit delegation of power to the federal defendants.

Congress has created a program which necessarily requires the formulation of policy in order to fill a gap left by Congress. *Morton v. Ruiz,* 415 U.S. 199, 231 (1974). Section 814[57] directs the Secretary to promulgate "such regulations as are necessary and appropriate to carry out his responsibilities under this [Title]." Whether the federal government holds title to an interest in a specific plot of land or column of water will depend on how "interests" and "title" are defined. Without such further definition, the term "public lands" is ambiguous. Since these terms must be fleshed out in order for the Secretary to administer ANILCA, the Secretary necessarily has the

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[57] 16 U.S.C. § 3124.

authority to make such a determination. Consequently, the Secretary's interpretation of "public lands" is reviewed under a reasonableness standard. *Chevron*, 476 U.S. at 844.

Although the Secretary received extensive comments regarding its proposed construction of the scope of Title VIII, the Secretary's rule was not accompanied by any legal analysis and merely stated in a conclusory fashion that public lands do not include navigable waterways:

> Numerous comments were received concerning the definitions of Federal lands and public lands. All of these comments focused on the issue of jurisdiction over fisheries in navigable waters. Many felt that the definitions should include navigable waters to protect subsistence use and the subsistence priority. They strongly believe it was Congress' intent to protect subsistence rights as broadly as possible. Additionally, many individuals commented that most subsistence resources are found in navigable waters.
>
> The scope of these regulations is limited by the definition of public lands, which is found in section 102 of ANILCA and which only involves lands, waters, and interests therein title to which is in the United States. Because the United States does not generally own title to the submerged lands beneath navigable waters in Alaska, the public lands definition in ANILCA and these regulations generally excludes navigable waters.
>
> Consequently, neither ANILCA nor these regulations apply generally to subsistence uses on navigable waters. However, based upon

> specific pre-Statehood reservations of submerged lands, § ___,3(b) [sic] establishes that these regulations apply to navigable waters located on the identified public lands. The listed areas remain subject to change through further rulemaking pending a review and determination of pre-Statehood reservations by the United States.

57 Fed. Reg. 22,940 at 22,942 (May 29, 1992).[58] The plaintiffs argue that the term "public lands" in Section 102

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[58] The above quoted language is the Secretary's current form of his decision with respect to whether public lands are navigable waterways. Originally, the Secretary's explanation was as follows:

> There were many comments on the exclusion of navigable waters from the definition of public lands. Some comments regarding the exclusion of State-selected and Native-selected lands in the definition were received also. There was a great deal of concern that the exclusion on navigable waters eliminated the majority of subsistence fishing, critical to the well being of rural communities. Some concerns were expressed also that the sport take of migratory species on State lands affects their numbers for subsistence purposes on public lands.
>
> The United States generally does not hold title to navigable waters and thus navigable waters generally are not included within the definition of public lands. Navigable waters are those waters used or susceptible of being used in their ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water.
>
> The scope of these regulations is limited by the definition of public lands in section 102 of ANILCA. Lands validly selected by the State or Native

should include all waters in which the United States has an interest by virtue of the reserved water rights doctrine and the navigational servitude. The court's task is to determine whether the Secretary's exclusion of these doctrines from his interpretation of Section 102 was reasonable. Each of the plaintiff's contentions will be examined in turn.

## Reserved Water Rights Doctrine

Reservation of water rights is empowered by the Commerce Clause (U.S. Const. art. I, § 8) and the Property Clause (U.S. Const. art. I, § 3). The doctrine applies to federal enclaves, encompassing water rights in navigable and nonnavigable streams. When the federal government withdraws its land from the public domain and reserves it for a federal purpose, the government by implication reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. The reserved water rights doctrine reserves only that amount of water necessary to fulfill the purposes of the reservation, no more. *Cappaert v. United States*, 426 U.S. 128, 138 (1976).

The parties do not dispute that the federal government reserved certain water appurtenant to the Wrangell-

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corporations are therefore excluded from this public lands definition.

Temporary Regulation, 55 Fed. Reg. 27,114 at 27,115 (June 29, 1990).

The court perceives no significant difference between the two texts.

Saint Elias National Park when it was established by ANILCA in 1980. Congress clearly stated the purposes for which this park was created:

> To maintain unimpaired the scenic beauty and quality of high mountain peaks, foothills, glacial systems, lakes, and streams, valleys, and coastal landscapes in their natural state; to protect habitat for, and populations of, fish and wildlife including but not limited to caribou, brown/grizzly bears, Dall sheep, moose, wolves, trumpeter swans and other waterfowl, and marine mammals; and to provide continued opportunities, including reasonable access for mountain climbing, mountaineering, and other wilderness recreational activities. *Subsistence uses by local residents shall be permitted in the park, where such uses are traditional, in accordance with [the provisions of Title VIII].*

Section 201(9), 16 U.S.C. § 410hh(9) (emphasis added). Applying the *Cappaert* analysis, it is clear that an unquantified amount of water appurtenant to the park was reserved for the purpose of providing rural Alaskans with the opportunity to pursue their subsistence rights under Title VIII.

The court declines to use the reserved water rights doctrine as a means of determining the geographic scope of the Title VIII. Although the court does not reject the notion that the reserved water rights doctrine could have some application in this case, or that it could be of primary importance in a subsistence case in some other location in Alaska, the court concludes that the geographic scope of Title VIII is better determined by use of

the navigational servitude, as being more compatible with the findings[59] and policies[60] of Title VIII of ANILCA.

## Navigational Servitude

Although both are grounded in the Commerce Clause, the federal navigational servitude is distinct from Congress's power to regulate navigable waterways. *Boone v. United States*, 944 F.2d 1489, 1493 (9th Cir. 1983), *citing Kaiser Aetna v. United States*, 444 U.S. 164, 173. Congress' authority to regulate waterways extends beyond waters that are navigable in fact[61], and is as broad as the needs of commerce. *Boone*, 944 F.2d at 1493.

By contrast, the navigational servitude is described as a "dominant servitude" and a "superior navigation easement". *Id.* at 1493-94. The purpose of the navigational servitude is to relieve the government of the obligation to compensate an owner of riparian, littoral, or submerged lands for acts which normally require compensation under the Fifth Amendment. *Id.* at 1494. The Ninth Circuit has explained the difference in the geographic scope of these two concepts:

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[59] ANILCA Section 801, 16 U.S.C. § 3111.

[60] ANILCA Section 802, 16 U.S.C. § 3112.

[61] Congress has the power under the Commerce Clause to regulate waterways that are navigable in fact, *The Daniel Ball*, 77 U.S. 557, 563 (1870); non-navigable tributaries, *United States v. Grand River Dam Authority*, 363 U.S. 229, 232 (1960); waters which were once navigable in fact but are no longer so, *Arizona v. California*, 283 U.S. 423, 453-54 (1931); and waters which may be made navigable by reasonable improvements, *United States v. Appalachian Electric Power*, 311 U.S. 377, 407-409 (1940).

The navigational servitude, unlike the power to regulate navigable waters under the commerce clause, is not coextensive with Congress' regulatory authority. First, unlike Congress' power to regulate waters for purposes of navigation, the navigational servitude "does not extend beyond the high-water mark" of navigable streams. *Rands*, 389 U.S. at 122, 88 S.Ct. at 266; *see also Kansas City Life Ins.*, 339 U.S. at 808, 70 S.Ct. at 890, *United States v. Willow River Co.*, 324 U.S. 499, 509, 65 S.Ct. 761, 767, 89 L.Ed. 1101 (1945). Thus, although the commerce clause power to regulate navigable waters permits, for example, regulatory authority over the non-navigable tributaries of streams, *see United States v. Grand River Dam Authority*, 363 U.S. 229, 232, 80 S.Ct. 1134, 1136, 4 L.Ed.2d 1186 (1960), the navigational servitude would not cover the same tributaries, *see United States v. Cress*, 243 U.S. 316, 326-27, 37 S.Ct. 380, 384, 61 L.Ed. 746 (1917), *Goose Creek Hunting Club, Inc. v. United States*, 518 F.2d 579, 582, 207 Ct.Cl. 323 (1975).

Second, the determination of navigability is different in different contexts. *Kaiser Aetna*, 444 U.S. at 171, 100 S.Ct. at 388. A waterway may be subject to the navigational servitude if it is navigable in fact in its natural state. *Kaiser Aetna*, 444 U.S. at 175, 100 S.Ct. at 390, *Cress*, 243 U.S. at 322-3, 37 S.Ct. at 382-83. Waterways are navigable in fact " 'when they are used, or are susceptible of being used, *in their ordinary condition*, as highways of commerce.' " *Cress*, 243 U.S. at 323, 37 S.Ct. at 383 (quoting *The Daniel Ball* 77 U.S. (10 Wall.) 557, 563, 19 L.Ed. 999 (1870) (emphasis in *Cress*)). By contrast, as explained above, navigability for purposes of the commerce clause authority to legislate, has been expanded to

> include both waterways once navigable but no longer so, and waterways never navigable but which may become so with reasonable improvements. *See Appalachian Electric*, 311 U.S. at 408, 61 S.Ct. at 299. Under this broad view of navigability, "[t]heoretically at least, there are no waters in the United States immune from [the power to regulate] navigation." Morreale, *supra*, at 9.

*Id.* at 1495-96 (footnotes omitted). The parties in this case frame the issue as whether the navigational servitude creates only a usufructuary right in the federal government (federal and state position) or a property interest to which the federal government holds title (plaintiffs' position). While this formulation of the "where" issue is not inappropriate, it is broader than necessary. The parties tend to focus on abstractions: what is land or an interest in land, and what is title to an interest in land? At the end of this discussion, we will focus more narrowly upon ANILCA Section 102 which includes in public lands interests in "waters" and upon the purpose of Title VIII of ANILCA.

The federal defendants cite *City of Angoon v. Hodel*, 803 F.2d 1016 (9th Cir. 1986), *cert. denied*, 484 U.S. 870 (1987), for the proposition that the United States does not hold title to the navigational servitude. *Angoon* involved a conveyance of land on Admiralty Island to a Native corporation under ANCSA. The Native corporation planned to harvest timber on the land. The City of Angoon sought an injunction to prevent the harvest, and objected that a subsistence evaluation required by

ANILCA Section 810[62] had not been prepared. Section 810 of ANILCA applies only if the land at issue is "public land". Although the harvest would take place only on land owned by the Native corporation, the City of Angoon argued that this use of corporation lands would affect subsistence uses on public lands, thus triggering application of Section 810. *Id.* at 1027. The Ninth Circuit rejected this broad reading of "public lands" and held that Section 810 did not apply. In a footnote, the Ninth Circuit addressed the City of Angoon's argument that "the EPA's and Corps' granting of permits under sections 402 and 404 of the Clean Water Act . . . required a section 810 subsistence evaluation because these determinations used 'public land': namely, a navigational servitude." *Id.* at 1027-28, n.6. The Ninth Circuit rejected this argument:

> "Public land" is defined to include all interests in land in which the United States holds title. ANILCA § 102(1)-(2), 16 U.S.C. § 3102(1)-(2). Since the United States does not hold title to the navigational servitude, the servitude is not "public land" within the meaning of ANILCA. *See United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 627-28, 81 S.Ct. 784, 787-88, 5 L.Ed.2d 838 (1961) (servitude is "power of government to control and regulate navigable waters in the interest of commerce") (quoting *United States v. Commodore Park*, 324 U.S. 386, 390, 65 S.Ct. 803, 805, 89 L.Ed. 1017 (1945)). For similar reasons, the Secretary was not required to perform a section 810 evaluation prior to transferring the Cube Cove lands to Shee Atika. Cube Cove is simply not "public land." *See* ANILCA §§ 102(3)

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[62] 16 U.S.C. § 3120.

> (B) and 810(c), 16 U.S.C. §§ 3102(3)(B) and 3120(c).

*Id.* The state defendants treat this language as dispositive of the issue before this court. However, in *Angoon* the issues were very different from those in this case. *Angoon* did not involve the scope of federal and state management of fish, nor did it address the subtleties regarding the terms "interests" or "title" presented by this case. The Ninth Circuit's observation in *Angoon,* that the United States does not hold title to the navigational servitude, appears to be premised on the conclusion that the servitude is a "power of government" rather than a property interest. *Angoon* contains no analysis of the character of the navigational servitude.

Five years after *Angoon* was decided, the Ninth Circuit had occasion to analyze in detail the genesis and scope of the navigational servitude, and it concluded that it does consist of a property interest. *Boone v. United States,* 944 F.2d 1489 (9th Cir. 1991), was a dispute over access to a lagoon in Hawaii. The United States contended that members of the public had the right to boat on the lagoon by virtue of the government's navigational servitude. The owners of the land surrounding the lagoon sought a declaration that the lagoon was not navigable and that they could therefore deny access to the public. The district court found that the lagoon was not navigable and entered judgment for the owners. In the course of describing the history and character of the navigational servitude, the Ninth Circuit commented:

> The label, "servitude," implies a property interest. How a constitutional grant of authority to Congress creates such an interest is explained

in *United States v. Twin City Power Co.*, 350 U.S. 222, 76 S.Ct. 259, 100 L.Ed. 240 (1956). The Court stated:

> "The interest of the United States in the flow of a navigable stream originates in the Commerce Clause. That Clause speaks in terms of power, not of property. But the power is a dominant one which can be asserted to the exclusion of any competing or conflicting one. The power is a privilege which we have called 'a dominant servitude,' or 'a superior navigational easement.' "

*Id.* at 224-25, 76 S.Ct. at 261 (citations omitted).

*Boone*, 944 F.2d at 1494, n.9. The Ninth Circuit's subsequent, and more thorough analysis of the character of the navigational servitude establishes, contrary to the comment in *Angoon*, that the servitude is not always accurately described as just a power. For purposes of ANILCA Title VIII, the navigational servitude is more properly characterized as an interest in waters. ANILCA Section 102 addresses interests in *both* "lands" and "waters".

The plaintiffs also argue that the Ninth Circuit's observation in *Angoon* is drawn into doubt by a subsequent Supreme Court decision, *Amoco Production Co. v. Hodel*, 480 U.S. 531 (1987). In *Amoco*, ANILCA Section 810 was once again used to challenge the action of a federal agency. The Secretary of the Interior granted oil and gas leases to oil companies off the coast of Alaska. The plaintiffs (Native villages and corporations) challenged the Secretary's failure to follow the requirements of Section 810 of ANILCA. The Supreme Court concluded that the Outer Continental Shelf (OCS) is not "public land as

defined in ANILCA. According to Section 102, "public lands" must be within the boundaries of the State of Alaska. The boundaries of the State of Alaska are delineated by its coastal waters which extend three miles from its coastline and end where the OCS commences.

In *Amoco*, as in *Angoon* and *Boone*, the issue on which we now focus was relegated to a footnote. The Secretary of the Interior had argued in the alternative that the United States did not hold title to the OCS. The Supreme Court indicated that Section 102 did not require fee title to be held by the United States in order for a tract to be "public land":

> The United States may not hold "title" to the submerged lands of the OCS, but we hesitate to conclude that the United States does not have "title" to any "interests therein." Certainly, it is not clear that Congress intended to exclude the OCS by defining public lands as "lands, waters, and interests therein" "the title to which is in the United States." We also reject the assertion that the phrase "public lands," in and of itself, has a precise meaning, without reference to a definitional section or its context in a statute.

*Id.* at 548-49, n.15 (citation omitted). The plaintiffs argue that since the Supreme Court reads the term "title" expansively, footnote 6 of *Angoon* has no further validity.

Footnote 15 in *Amoco* is a clear signal that the term "title" in Section 102 can refer to something less than technical fee title. This result was suggested, indeed we think required, because Section 102(1) of ANILCA expressly defines "lands" as including "interests" in both "lands" and "waters". Footnote 9 of *Boone*, and the cases

cited therein, reinforce the proposition that the United States may be considered to own an "interest" in property by virtue of the navigational servitude. The court concludes that, for purposes of Title VIII of ANILCA, the United States holds title to an interest in the navigable waters of Alaska.

The court also concludes that the Secretary's construction of Section 102 was not reasonable because his interpretation of "interests" in "waters" and "title" was too narrow. The court does not reach this conclusion solely upon the basis of the foregoing authority. The court has given equal consideration to whether the position taken by the Secretary does or does not advance the congressional purpose and policy of ANILCA, which are found in ANILCA Sections 101(c) and 802(1).[63]

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[63] ANILCA Section 101(c), 16 U.S.C. § 3101(c), provides:

> It is further the intent and purpose of this Act consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for which each conservation system unit is established, designated, or expanded by or pursuant to this Act, to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so.

ANILCA Section 802(1), 16 U.S.C. § 3112(1), provides:

> It is hereby declared to be the policy of Congress that –
>
> (1) consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands; consistent with management of fish and wildlife in

By limiting the scope of Title VIII to non-navigable waterways, the Secretary has, to a large degree, thwarted Congress' intent to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so. Much subsistence fishing and much of the best fishing is in the large navigable waterways where one has access to the most fish as opposed to the smaller tributaries or lakes where, for example, salmon go to spawn. The Tanada Creek subsistence fishery is at Batzulnetas, at the confluence of the Copper River and Tanada Creek, not far upstream in some non-navigable tributary. Fish, salmon in particular, mature on the high seas. They spawn in the shallows of far upland creeks and lakes which are reached only after passing the gauntlet of commercial fisheries in the territorial seas (especially in Prince William Sound insofar as the Copper River is concerned) and sport and Alaska's wide open subsistence fishing on the entire Copper River. The food quality of salmon is substantially degraded by the time these fish reach the spawning grounds. By the regulations which excluded navigable waters from the jurisdiction of the Federal Subsistence Board, the Secretary abandoned to the non-consistent[64] state subsistence program the largest

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> accordance with recognized scientific principles and the purposes of each unit established, designated, or expanded by or pursuant to titles II through VII of this Act, the purpose of this subchapter is to provide the opportunity for rural residents engaged in a subsistence way of life to do so[.]

Section 802 (§ 3112) is quoted in full at [pages 5 to 6 of supplemental appendix.]

[64] See ANILCA Section 805(d), 16 U.S.C. § 3115(d).

and most productive waters used by rural Alaskans who have a subsistence lifestyle.

As additional grounds for its ruling, the court notes that Congress specifically invoked its constitutional authority under the commerce clause "to protect and provide the opportunity for continued subsistence uses" when it enacted Title VIII.[65] Thus, even if the navigational servitude is viewed as a power to regulate rather than a property interest, Congress exercised that power to protect subsistence uses by rural Alaskans.

## Conclusion

The court concludes that the Secretary, not the State of Alaska, is entitled to manage fish and wildlife on public lands in Alaska for purposes of Title VIII of ANILCA. The State's motion for partial summary judgment[66] on Count III of its amended complaint is denied. Count III is dismissed.

The court further concludes that the Secretary's interpretation of Section 102 is unreasonable. For purposes of Title VIII, "public lands" includes all navigable waterways in Alaska. The federal defendants' motions to dismiss the plaintiff's complaint for failure to state a claim upon which relief, or in the alternative for summary judgment (Clerk's Docket Nos. 2, 17, and 121) are denied. The State of Alaska's motions to dismiss or for summary judgment (Clerk's Docket Nos. 38 and 124) are denied.

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[65] ANILCA Section 801(4), 16 U.S.C. § 3111(4).

[66] Clerk's Docket No. 113.

The plaintiff's motion for partial summary judgment (Clerk's Docket No. 48) is granted.

DATED at Anchorage, Alaska, this 30 day of March, 1994.

/s/ H. Russel Holland
United States
District Judge

cc: *R. Anderson (NARF)
*M. Walleri
*J. Johnson (ALS)
*D. Dunsmore
*M. Stanley
*P. Giannini
*J. Grace (AAG-200)
* E. Boyko
* L. Gordon (ASHBURN)
* D. Mitchell
* E. Smith
* J. Bailey

*(w/att appendix)

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APPENDIX

An examination of the legislative history of Title VIII reveals the following evolution in Congressional policy.

The initial House bill sponsored by Congressman Udall (H.R. 39, Jan. 4, 1977, Vol. 1 at 204, Alaska Department of Fish and Game, Legislative History of ANILCA),[1] specifically provided that the Secretary of the Interior would manage subsistence uses of fish and game on Alaska's public lands by issuing regulations on seasons and bag limits. ADFG, Vol. 1 at 222-231.

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[1] Hereinafter "ADFG, Vol. ___ at ___".

Next, the House Interior Committee proposed amendments that narrowed the Secretary's role by allowing the State of Alaska to manage subsistence uses on public lands. However, the amendments specifically stated that the Secretary could suspend the State's management and take over such management if he determined that the State's program did not comply with the subsistence preference in Title VIII (then Title VII). House Interior Committee Report, April 7, 1978, ADFG, Vol. 33 at 32-38, 186-192, 237-240.

The House Merchant Marine Committee then proposed that the Secretary's role should be limited even further. Federal regulation of subsistence uses of fish and wildlife on public lands was eliminated; the burden of all such regulation fell on the State. If the State's program did not comply with the federal subsistence preference, the Secretary was authorized to close the public lands to consumptive uses while the State redrafted its regulations. House Merchant Marine Committee Report, May 4, 1978, ADFG, Vol. 33 at 417, 496, 509-515. The House passed a version of ANILCA on May 23, 1978, that included the House Merchant Marine Committee's version of Title VIII (VII). ADFG, Vol. 2 at 419, 512-539.

The Senate Energy Committee issued a report on October 9, 1978. The Energy Committee revised the structure of Title VIII and inserted a judicial enforcement provision, Section 807, in place of the Secretary's closure authority. Under the proposed Section 807, the Secretary was to act as an advocate in federal court on behalf of parties aggrieved by the State's failure to provide for the subsistence preference, in specific instances.

Section 807 is meant to provide a mechanism to rectify individual instances of the State's non-compliance with Title VIII. Previous House versions allowed the Secretary to step in and promulgate a regulation addressing a need in a particular time and place when he determined that the applicable state regulation did not comport with Title VIII. The initial version of Section 807 authorized the Secretary to obtain a court decree on behalf of an aggrieved party that would direct the State to promulgate a new regulation. The Senate Committee Report described the genesis of Section 807 as follows:

> The subsistence management provisions of H.R. 39 as passed by the House of Representatives reflect a delicate balance between the traditional responsibility of the State of Alaska for the regulation of fish and wildlife populations within the State and the responsibility of the Federal government for the attainment of national interest goals, including the protection of the traditional lifestyle and culture of Alaska Natives. Although the committee has adopted a subsistence management system similar in concept to the House approach, after careful consideration the committee has modified the Federal-State relationship in a number of important aspects.
>
> Section 704 of the House bill requires the State to develop and implement a subsistence management program which includes a regionalized regulatory system for the management of fish and wildlife on the public lands for subsistence uses, and laws or regulations which provide preference for nonwasteful subsistence uses by local residents consumptive uses of fish

and wildlife on the public lands. The State regulations must further provide preferences for subsistence uses shall be based upon local residency, customary and direct dependence upon such populations as the mainstay of livelihood and the availability of alternative resources. The committee determined that inclusion of these requirements as part of a federally mandated State program is an unnecessary intrusion into traditional State responsibility for fish and wildlife management. Consequently, the committee retained both of these requirements in sections 804 and 805 respectively, but has eliminated the requirement that they be included as part of a formal State program.

Section 705(c) of the House bill requires the Secretary to take certain administrative action if he determines that the State has failed to establish a subsistence program or to implement such a program in a manner which adequately satisfies the preference for subsistence uses. While the committee has retained broad Federal guidelines to ensure the adequate implementation of the subsistence preference on the public lands and the Secretary's ongoing responsibility to monitor the States's implementation of such preference, the Committee believes that the responsibility of the Secretary to ensure the protection of subsistence uses and the satisfaction of subsistence needs of Alaska Natives and other rural residents can best be met by providing legal representation for such residents before the United States District Court in appropriate instances in which the Secretary has determined, after consultation with the State, that the State has not timely or adequately provided for the preference for subsistence uses.

> Although it is the intent of the committee to neither enlarge nor diminish any existing authority of the Secretary to take appropriate administrative action to protect subsistence uses and satisfy subsistence needs of rural residents of Alaska, the committee believes that the responsibilities and authorities of the Secretary and the United States District Court set forth in section 804-807 ensure the protection of subsistence activities and the discharge of Federal responsibilities.

Sen. Rep. No. 95-1300 at 196-7, 95th Cong., 2d Sess. (1978). [ADFG, Vol. 33 at 752-753.]

While the above quoted legislative history specifically defines the Secretary's function when the State's regulations fail to comply with Title VIII in specific instances, it does not give the state and Federal regulators any guidance as to their respective roles should the State's entire subsistence program be declared illegal.

The initial version of Section 807 also provided that the Secretary would monitor the State's administration of its program (Section 806), and that the Secretary would establish regional advisory councils if the State failed to do so (Section 805). The Secretary also retained his traditional authority to manage public lands by regulating access and wildlife habitats. ADFG, Vol. 33 at 555, 582-588, 751-753, 775-786, 841, 987-988.

H.R. 39 returned to the House in the 96th Congress and the House Interior Committee issued a report on April 18, 1979, in which it adopted the Senate Committee's version of Title VIII (VII). ADFG, Vol. 34 at 1, 56-66, 145, 239-241. A group of dissenters presented additional

views which further demonstrated that the Secretary's duties had been reduced from its original function as sole regulator. *Id.* at 389, 546-556. The House Merchant Marine Committee issued a report on April 23, 1979, that echoed the Senate Energy and House Interior Committee's conclusions. ADFG, Vol. 35 at 1, 4349, 161-164. The House passed this version of ANILCA on May 16, 1979.

The Senate Energy Committee issued the final committee report on ANILCA on November 14, 1979. The judicial enforcement provision still required the Secretary to act as an advocate for parties aggrieved by the State's failure to provide for the subsistence preference, in specific instances. ADFG, Vol. 35 at 271, 308-314. This version of ANILCA was passed by the Senate on August 19, 1980, and was referred to the House in November of 1980.

The final amendments to Title VIII were made by Concurrent Resolutions 452 and 453 only days before ANILCA became law on December 2, 1980.[2] Senator Stevens submitted a prepared document as legislative history of the changes, which was printed in the Congressional Record. ADFG, Vol. 39 at 155-158. The amendment to Section 807 eliminated the Secretary's role as advocate in federal court and substituted a private right of action for parties aggrieved by the State's failure to provide for the subsistence preference. Representative Udall submitted the concurrent resolutions in the House. *Id.* at 499-501. This eleventh-hour revision to Section 807

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[2] Congressman Udall lodged a detailed discussion of the pending bill in the Congressional Record on November 12, 1980. ADFG, Vol. 39, at 133-151. See discussion of Title VIII, *id.* at 145-149.

became law with the passage of ANILCA on December 2, 1980.

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Supreme Court, U.S.
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Nos. 95-1084 and 95-1496

# In the Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF ALASKA, PETITIONER

*v.*

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ALASKA FEDERATION OF NATIVES, CROSS-PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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23 pp

## QUESTION PRESENTED

Whether the court of appeals correctly concluded, on interlocutory appeal, that the subsistence fishing provisions of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3101 *et seq.*, which give a priority to subsistence fishing on "public lands," apply to fishing on some, but not all, navigable waters in Alaska.

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OCTOBER TERM, 1995

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No. 95-1084

STATE OF ALASKA, PETITIONER

*v.*

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

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No. 95-1496

ALASKA FEDERATION OF NATIVES, CROSS-PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

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*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1-24) is reported at 72 F.3d 698. The opinion

of the district court (Pet. Supp. App. 1-50) is unreported.[1]

## JURISDICTION

The initial opinion of the court of appeals was filed on April 20, 1995, and a petition for rehearing was denied on August 8, 1995 (Pet. App. 55). Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including December 6, 1995 (Pet. App. 56), and the State of Alaska filed a petition on that date (No. 95-892). On December 19, 1995, the court of appeals withdrew and replaced its opinion. The State accordingly withdrew its petition in No. 95-892 and, on January 5, 1996, filed a new petition for a writ of certiorari under the current docket number. The private petitioner filed a cross-petition on March 18, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

## STATEMENT

Private respondents Katie John and other Native Alaskan entities sued the United States in the United States District Court for the District of Alaska under the Alaska National Interest Lands Conservation Act (ANILCA or the Act), 16 U.S.C. 3101 *et seq.* They sought to establish their right to engage in subsistence fishing at Batzulnetas, a traditional Native Alaskan fishing camp within the boundaries of the Wrangell-St. Elias National Park and Preserve. See Pet. Supp. App. 1-2, 22-27. The private respondents later named the State of Alaska as a defendant in that action. See *id.* at 26-27. The

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[1] The citations to "Pet. App." and "Pet. Supp. App." respectively refer to the appendix and supplemental appendix filed in No. 95-1084.

district court granted partial summary judgment to the private respondents on certain legal issues. See *id.* at 43-44. The district court certified that decision for interlocutory appeal under 28 U.S.C. 1292(b), and the court of appeals reversed the district court's decision, but on narrower grounds than the State had urged. See Pet. App. 1-24.

1. Congress enacted ANILCA to preserve "certain lands and waters in the State of Alaska that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values." 16 U.S.C. 3101(a). Congress recognized that public lands in Alaska have special value in supporting "subsistence uses," which Congress defined to include "the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption." 16 U.S.C. 3113. Congress declared a federal policy "to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of [public] lands." 16 U.S.C. 3112(1).

ANILCA contains specific provisions to preserve "the opportunity for rural residents [of Alaska] engaged in a subsistence way of life to continue to do so." 16 U.S.C. 3101(c). Title VIII of ANILCA establishes a priority for "the taking on public lands of fish and wildlife for nonwasteful subsistence uses * * * over the taking on such lands of fish and wildlife for other purposes." 16 U.S.C. 3114. The Act defines "public lands" to mean (with certain exceptions) lands situated within Alaska that are "federal lands." 16 U.S.C. 3102(3). It defines "federal land" to mean "lands the title to which is in the United States," 16

U.S.C. 3102(2), and it defines "land" to mean "lands, waters, and interests therein," 16 U.S.C. 3102(1).

Title VIII of ANILCA authorizes the Secretaries of the Interior and Agriculture to "prescribe such regulations as are necessary and appropriate to carry out [their] responsibilities" under the Act. 16 U.S.C. 3124; see 16 U.S.C. 3102(12). Title VIII also directs the Secretaries to establish regional advisory councils to review and evaluate proposals for the subsistence use of fish and wildlife. 16 U.S.C. 3115(a). The Secretaries must consider the reports and recommendations of the regional advisory councils when exercising their "administrative authority over the public lands," 16 U.S.C. 3115(c), but they need not follow the recommendation of a regional council if they determine that the recommendation violates recognized principles of fish and wildlife conservation or "would be detrimental to the satisfaction of subsistence needs." *Ibid.*

In recognition of the State of Alaska's traditional responsibility for regulation of fish and wildlife in Alaska, Title VIII of ANILCA permits the establishment of an alternative state regulatory structure to protect subsistence use of public lands by rural Alaska residents. The Act provides that, if within one year of ANILCA's enactment, the State "enacts and . . . implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in" ANILCA for rural residents, then the Secretary shall not implement the provisions of ANILCA directing the establishment of regional advisory councils. 16 U.S.C. 3115(d). Instead, the state laws, "unless and until repealed, shall supersede such sections [of

ANILCA] * * * for the taking of fish and wildlife on the public lands for subsistence uses." *Ibid.*

2. When ANILCA was enacted, both the State of Alaska and the federal government anticipated that the preference for subsistence uses of wild, renewable resources on public lands by rural residents would be administered by the State of Alaska pursuant to a state regulatory scheme. At the time, Alaska had already adopted a statute conforming generally to ANILCA's requirements for management of subsistence uses of fish and wildlife. See *Bobby* v. *Alaska*, 718 F. Supp. 764, 788-791 (D. Alaska 1989). That statute provided a priority for nonwasteful subsistence use of wild, renewable resources, but it did not limit the priority to "rural Alaska residents," as required by 16 U.S.C. 3113. The State therefore promulgated regulations recognizing that limitation. See *Bobby*, 718 F. Supp. at 767. On May 14, 1982, after the federal government's review and approval of the state regulatory scheme, the State became responsible for all regulation of subsistence use of wild, renewable resources under ANILCA. *Ibid.*

In 1985, the Alaska Supreme Court concluded that the State's regulations limiting the subsistence priority to rural Alaska residents were inconsistent with state statutory law. *Madison* v. *Alaska Dep't of Fish & Game*, 696 P.2d 168 (Alaska 1985). Without that eligibility limitation, the State's subsistence priority ceased to comply with ANILCA, and the Secretary of the Interior withdrew certification of the State's regulatory scheme, pending enactment of state subsistence legislation consistent with ANILCA. See *Bobby*, 718 F. Supp. at 768. The Alaska Legislature then amended the State's subsistence laws to remedy the inconsistency with ANILCA. See

*ibid.*; *Kenaitze Indian Tribe* v. *Alaska*, 860 F.2d 312, 314 (9th Cir. 1988), cert. denied, 491 U.S. 905 (1989).

In 1989, the Alaska Supreme Court concluded that the amended state subsistence statute violated Alaska's Constitution. See *McDowell* v. *Alaska*, 785 P.2d 1 (1989). The Alaska Supreme Court held that the state constitution prohibits the State from according a preference for the use of renewable resources on the basis of residency and that, because ANILCA expressly reserves the priority for "rural Alaska residents," the State could not conform its legislation to ANILCA without violating the constitutional ban. *Id.* at 6-9. As a result, the United States became obligated to implement ANILCA's subsistence requirements. See 16 U.S.C. 3115.

On June 29, 1990, the Department of the Interior and the Department of Agriculture jointly published temporary subsistence management regulations. See 55 Fed. Reg. 27,114. Among other things, the regulations provided that the priority for subsistence use on "public lands" does not apply to navigable waters. The Departments noted that "[t]he United States generally does not hold title to navigable waters and thus navigable waters generally are not included within the definition of public lands." *Id.* at 27,115; see *id.* at 27,118. The final regulations, which made no relevant change in the interpretation of the scope of federal authority, provided that the priority for subsistence use was limited to "all public lands including all non-navigable waters located on these lands." 50 C.F.R. 100.3(b). See 57 Fed. Reg. 22,940, 22,942 (1992).

3. On December 5, 1990, the private respondents in this case filed suit against the United States in federal district court challenging the exclusion of nav-

igable waters from the federal subsistence regulations. *Katie John* v. *United States*, No. A90-484-CV (HRH) (D. Alaska). The private respondents conducted traditional subsistence fishing at Batzulnetas, which is located within Wrangell-St. Elias National Park and Preserve in south-central Alaska. The fishing camp is located near the confluence of Tanada Creek and Copper River, which have been assumed to be navigable waterways for purposes of this litigation based on a determination by the National Park Service.[2] The plaintiffs sought to extend the priority for rural Alaska subsistence users to fishing at that location. The plaintiffs later joined the State of Alaska as a defendant on the ground that the State claimed general authority, apart from ANILCA, to regulate fishing at Batzulnetas. See Pet. Supp. App. 23-27; E.R. CR8 (private respondents' first amended complaint).[3]

At the time that the private respondents' suit against the United States was pending, Alaska brought a suit against federal officials that challenged the federal government's authority to implement the subsistence management program set out in the temporary federal regulations. *Alaska* v. *Lujan*, No. 92-264-CV (HRH) (D. Alaska). See E.R. CR1 (State's complaint for declaratory and injunctive relief). The district court consolidated Alaska's suit

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[2] Neither the Bureau of Land Management nor the courts have made formal navigability determinations with respect to those rivers.

[3] In 1985, before the Alaska Supreme Court's decision in *McDowell*, the private respondents had commenced litigation against the State of Alaska concerning the State's program for regulating subsistence fishing. The lawsuit at issue here is an outgrowth of that original litigation. See Pet. Supp. App. A24.

with the private respondents' suit, and it has managed those cases jointly with other pending litigation involving subsistence fishing issues. See Pet. App. 1-2.

After consulting with counsel, the district court determined that it should first decide two fundamental issues of law: "who is entitled to manage fish and game within Alaska for purposes of ANILCA, and where does ANILCA apply?" Pet. Supp. App. 2. The parties filed motions for partial summary judgment respecting those questions. In response, the district court ruled on the first issue that "the Secretary, not the State of Alaska, is entitled to manage fish and wildlife on public lands in Alaska for purposes of Title VIII of ANILCA," and it consequently denied the State's motion for partial summary judgment on that issue and dismissed that count of the complaint. *Id.* at 43. On the second issue, it ruled that, "[f]or purposes of Title VIII, 'public lands' includes all navigable waterways in Alaska," and it consequently granted the private respondents' motion for partial summary judgment. *Ibid.*[4]

4. The district court certified its order for interlocutory review under 28 U.S.C. 1292(b). The court of

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[4] At the outset of the litigation, the United States had defended the provisions of the federal regulations that excluded all navigable waters from the federal subsistence management program. At the time of the motions for partial summary judgment, the United States had concluded that the interpretation was not correct. It urged instead that at least some navigable waters—those that are subject to federal reserved rights—are subject to federal subsistence management. See Pet. App. 6. The district court did not reject that theory, but concluded that navigability by itself provided a better basis for determining the geographic scope of ANILCA in this case. See Pet. Supp. App. 33-34.

appeals granted leave for the State of Alaska and the United States to appeal, and a unanimous panel reversed the district court's rulings with respect to the geographic scope of ANILCA. *Alaska* v. *Babbitt*, 54 F.3d 549 (9th Cir. 1995). Based on its review of ANILCA's language and legislative history, the court of appeals had "no doubt that Congress intended that public lands include at least some navigable waters." *Id.* at 552 (footnote omitted). The court accordingly rejected the State's contention that all navigable waters in Alaska are exempt from regulation for subsistence use under ANILCA. But unlike the district court, it was unwilling to accept the private respondents' contention that ANILCA's subsistence priorities extended to all of Alaska's navigable waters. Instead, the court of appeals agreed with the United States' position, first taken in the district court (see note 4, *supra*), that ANILCA extends to "some navigable waters" and that the reserved water rights doctrine provides an appropriate basis for determining what waters are subject to federal subsistence management. 54 F.3d at 553-554.[5]

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[5] Alaska had also asked the court of appeals to review the district court's ruling that the United States, rather than Alaska, had authority to manage subsistence uses. Alaska ultimately dismissed its appeal on that issue with prejudice. The Alaska Legislature and a private organization attempted to intervene for the purpose of continuing the appeal, but the court of appeals rejected those motions. See 54 F.3d at 550 n.2. This Court denied petitions for a writ of certiorari arising from those attempts to intervene. See *Alaska State Legislature* v. *Alaska*, cert. denied, 116 S. Ct. 68 (1995) (No. 94-1976); *Alaska Fish & Wildlife Fed'n* v. *Alaska*, cert. denied, 116 U.S. 272 (1995) (No. 94-1829).

On December 6, 1995, the State of Alaska filed a petition for a writ of certiorari requesting review of the court of appeals' decision respecting the geographic scope of ANILCA. *Alaska* v. *Babbitt*, No. 95-892. On December 19, 1995, the court of appeals withdrew its original unanimous decision and reissued it as a majority opinion, accompanied by a dissenting opinion of Judge Hall. Alaska then withdrew its petition in No. 95-892 and substituted the current petition, which reflects Judge Hall's change of view. See Pet. App. 1-14 (majority opinion); *id.* at 15-24 (Hall, J., dissenting).

## ARGUMENT

The court of appeals properly concluded that ANILCA's provision of a priority for subsistence fishing applies to some, but not all, navigable waters within Alaska. That decision, which was issued on interlocutory appeal, does not warrant this Court's review. The decision does not have any significance outside of Alaska, and it involves an issue that is the current subject of a new federal rulemaking proceeding. Contrary to Alaska's urgings, the court of appeals' decision does not conflict with the Alaska Supreme Court's decision in *Totemoff* v. *Alaska*, 905 P.2d 954 (1995). Moreover, as the court of appeals recognized, the questions of whether, and to what extent, the United States or Alaska is responsible for regulating subsistence fishing in navigable waters is intertwined with policy issues that should be addressed in the first instance through the administrative and political fora.

1. ANILCA expressly provides that "the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the

taking on such lands of fish and wildlife for other purposes." 16 U.S.C. 3114. The specific question in this case is whether that priority applies to a taking of fish from a fish camp at Batzulnetas, which is located at the confluence of Tanada Creek and Copper River within the boundaries of the Wrangell-St. Elias National Park and Preserve. The private respondents sought to establish their right to a subsistence priority at that location in the face of federal regulations that dictated a contrary result. Those regulations would have precluded a subsistence priority at that location on the theory that the fish are taken from navigable waters and that such waters are categorically excluded from "public lands" within the meaning of ANILCA. See 57 Fed. Reg. 22,942 (1992).

Alaska argues, in accordance with those regulations, that ANILCA's subsistence priority can never apply to navigable waters. See 95-1084 Pet. 15-21. However, the United States determined in the course of responding to the private respondents' motion for summary judgment that the theory put forward in the regulations cannot be reconciled with the text of ANILCA itself. Both the district court and the court of appeals agreed that the regulations' categorical exclusion of all navigable waters is untenable. As the court of appeals explained:

> ANILCA's language and legislative history indicate clearly that Congress spoke to the precise question of whether *some* navigable waters may be public lands. They clearly indicate that subsistence uses include subsistence fishing. *See e.g.*, 16 U.S.C. § 3113. And subsistence fishing has traditionally taken place in navigable waters. Thus, we have no doubt that Congress

> intended that public lands include at least some navigable waters.

Pet. App. 8. The dissenting judge concurred in that conclusion. See *id.* at 18 ("I agree with the majority that Congress, in order to achieve its stated purpose, must have intended *some* navigable waters to fall under ANILCA.") (Hall, J., dissenting).

Although the district court and the court of appeals agreed that the federal regulations were inconsistent with ANILCA, they disagreed on the appropriate principle for determining which navigable waters are subject to ANILCA's subsistence priority. The private petitioner advances the view set out in the district court's decision, which held that the subsistence priority should apply to *all* navigable waters in Alaska. 95-1496 Pet. 7-16; see Pet. Supp. App. 34-43. The court of appeals concluded, however, that the subsistence priority should apply to only those navigable waters that are subject to federal reserved water rights. See Pet. App. 12-13. Under the court of appeals' rationale, the ANILCA subsistence priority would generally be applicable to fishing activities within the boundaries of federal reservations that were set aside with the explicit or implicit understanding that the use of the waters was needed to accomplish the purposes of the reservation. See *id.* at 11 (citing *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976)). But the court left it to the relevant federal agencies to determine precisely "which navigable waters are public lands subject to federal subsistence management." Pet. App. 13.

The fishing location at issue in this case, for example, is within the Wrangell-St. Elias National Park and Preserve, which was established for the

purpose, *inter alia*, "to protect habitat for, and populations of, fish and wildlife," and specifically provides that "[s]ubsistence uses by local residents shall be permitted in the park, where such uses are traditional, in accordance with [Title VIII of ANILCA]." 16 U.S.C. 410hh(9). Relying on that statutory text, the district court concluded that, "[a]pplying the *Cappaert* analysis, it is clear that an unquantified amount of water appurtenant to the park was reserved for the purpose of providing rural Alaskans with the opportunity to pursue their subsistence rights under Title VIII." Pet. Supp. App. 33. The court of appeals, however, has not yet addressed the question whether the subsistence priority applies to the location at issue in this case.

2. There is no warrant for this Court to review that interlocutory ruling at the request of Alaska or the private petitioner. This Court has long followed the practice of declining to "issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co.* v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893). See, *e.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967); *Virginia Military Institute* v. *United States*, 113 S. Ct. 2431 (1993) (Scalia, J., concurring in the denial of certiorari). This case does not present any "extraordinary" circumstances mandating immediate review, and the lack of finality "of itself alone" accordingly provides a sufficient basis for denial of the petition for a writ of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). See

generally Robert L. Stern, *et al.*, *Supreme Court Practice* 195-199 (7th ed. 1993).

a. The court of appeals' decision in this case does not finally resolve the geographic scope of ANILCA's provisions granting a priority to subsistence fishing. The court's interlocutory decision has not definitively resolved any legal rights, including the private respondents' subsistence rights at the particular location at issue in this case. The district court specifically certified for interlocutory appeal under 28 U.S.C. 1292(b) its ruling that ANILCA's subsistence priority applies to *all* navigable waters. By doing so, it necessarily reserved decision on unresolved claims and defenses and preserved its right to reconsider any past rulings (including the existence of reserved water rights in the Wrangell-St. Elias National Park and Preserve) before entry of a final judgment. The district court's final resolution of all matters in the litigation (and the court of appeals' later review of those matters) could substantially affect the need for this Court to address the issue presented here. In keeping with the public interest in the Court's orderly management of its docket, it should not resolve whether to grant review in this case until all issues in the case have been decided. See *Virginia Military Institute*, 113 S. Ct. at 2431 (Scalia, J., concurring in denial of certiorari); cf. William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 Judicature 230, 231-232 (1983).

b. This case does not present any "extraordinary" circumstances dictating a need for immediate review. Contrary to the arguments of Alaska and its amici, this case does not present any issue of importance outside of the State of Alaska. The court of appeals expressly stated that its interpretation would

not affect "navigable waters elsewhere" because "ANILCA applies only to Alaska." Pet. App. 8 n.9. And even within Alaska, the consequences of the decision are uncertain. Under the court of appeals' interlocutory ruling, the resolution of specific disputes concerning whether the subsistence fishing priority applies to specific activities within federal reservations will depend on either a determination by the relevant federal agencies of "which navigable waters are public lands subject to subsistence management" (*id.* at 13) or additional litigation. The Department of the Interior recently issued an advance notice of proposed rulemaking, including preliminary regulatory text, for public comment. See 61 Fed. Reg. 15,014 (Apr. 4, 1996). Alaska, the private cross-petitioner, and the private respondents are expected to participate in the formulation of the final regulations, which are likely to have a direct bearing on the precise contours and practical importance of the issues involved in this case. And those regulations will, of course, be subject to judicial review.[6]

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[6] Alaska is incorrect in asserting (95-1084 Pet. 9-13) that this case presents a conflict between federal and state regulations. Alaska's petition is replete with speculation regarding "potential" and "likely" scenarios, but there is no sound basis to believe at this point that the final federal regulations will be incompatible with the State's regulatory programs. Indeed, past experience indicates that federal and state authorities are able to manage wildlife cooperatively. For example, Alaska notes (*id.* at 11 n.4) that the State's hunting regulations differ from hunting regulations that the federal government has applied to public lands. But the State has failed to establish that those differences have resulted in any significant conflict in the actual administration of hunting regulations on public lands.

c. Far from presenting "extraordinary" circumstances justifying interlocutory review, the court of appeals' decision does not even satisfy the Court's normal certiorari criteria. The court of appeals' decision does not conflict with any decision of this Court or another court of appeals. And contrary to Alaska's contentions (95-1084 Pet. 8-13), it does not conflict with the Alaska Supreme Court's interlocutory decision in *Totemoff* v. *Alaska*, 905 P.2d 954 (1995) (*reproduced at* Pet. App. 25-54), petition for certiorari pending, No. 95-1512 (filed Mar. 19, 1996). Alaska's assertion of a "jurisdictional crisis" (95-1084 Pet. 8) is unfounded.

In *Totemoff*, the State of Alaska prosecuted a rural hunter for locating and shooting a deer at night through the use of a spotlight. The hunter shined his spotlight and fired his gun from a boat in Prince William Sound while the deer stood on a federally owned island. 905 P.2d at 957. The defendant contended that he was engaged in "customary and traditional" subsistence hunting practices and that ANILCA therefore preempted a state regulation prohibiting hunting with a spotlight. The state supreme court rejected that claim, explaining that Alaska retains its authority to enforce its hunting regulations on federal lands except to the extent that there is an actual conflict between federal and state regulation. *Id.* at 958-960. It concluded that there was no conflict between ANILCA's federal subsistence program and the State's anti-spotlighting regulation. See *id.* at 960-961.

The state supreme court's conclusion that ANILCA did not preempt the state regulation resolved the defendant's preemption claim. The court nevertheless additionally opined that even if ANILCA

generally preempted the State's anti-spotlighting regulation, it would not do so in this case because the defendant engaged in spotlighting while on a boat in navigable marine waters and was therefore outside of ANILCA's geographic reach. 905 P.2d at 961-968. In discussing that matter, the state supreme court took issue with the court of appeals' decision in this case. See *id.* at 962-968. That extended discussion, however, was entirely unnecessary in light of the court's preemption ruling.[7] The state supreme court's obiter dicta provides no basis for Alaska to assert a conflict between the court of appeals and the state supreme court. See *Metropolitan Stevedore Co.* v. *Rambo*, 115 S. Ct. 2144, 2149 (1995) ("Breath spent repeating dicta does not infuse it with life."); *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956) ("This Court * * * reviews judgments, not statements in opinions.").[8]

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[7] The state supreme court implicitly acknowledged that its discussion was dicta, stating:

> We *hold* that ANILCA does not protect the use of a spotlight as a customary and traditional method of subsistence hunting, and thus there is no actual conflict between ANILCA and Alaska law. * * * * * *Even if* ANILCA does protect customary and traditional means and methods, thereby preempting state enforcement of the anti-spotlighting regulation against Totemoff on federal land, the State still has criminal jurisdiction if ANILCA does not apply to the navigable waters from which Totemoff shined his spotlight at the deer.

905 P.2d at 961 (emphasis added).

[8] Even if the discussion in *Totemoff* were holding rather than dictum, the case would not present an occasion for this Court's review. The Alaska Supreme Court reversed and remanded the defendant's conviction on independent state grounds, directing the lower court to allow "for development

d. Not only are there no sound reasons to grant certiorari, but there are compelling prudential considerations that weigh against review. Alaska contends that the question whether the federal government or the State should be responsible for regulating subsistence fishing in navigable waters presents a policy issue of considerable importance to the State. See 95-1084 Pet. 3. But that contention simply underscores that this Court should expect the parties to afford the pending rulemaking proceeding an opportunity to resolve various issues and, if necessary, to exhaust the political processes before asking the Court to resolve the issue. As the court of appeals explained, the issue presented here—if it is not ultimately resolved in a satisfactory manner through the pending rulemaking process—"cries out for a legislative, not a judicial, solution." Pet. App. 13. Furthermore, the issue here could be resolved through legislative action by *either* Alaska or Congress. As the court of appeals observed:

> If the Alaska Legislature were to amend the state constitution or otherwise comply with ANILCA's rural subsistence priority, the state could resume management of subsistence uses on public lands including navigable waters. * * * If Congress were to amend ANILCA, it could clarify both the definition of public lands and its intent. Only legislative action by Alaska or Congress will truly resolve the problem.

*Id.* at 13-14. See also *id.* at 23 (Hall, J., dissenting).

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of the record relevant to Totemoff's procedural challenge to the spotlighting ban." 905 P.2d at 973. Hence, the *Totemoff* decision is itself interlocutory.

It is unclear, of course, whether Alaska or Congress will take the actions suggested by the court of appeals. But in light of the interlocutory nature of the court of appeals' decision, the pendency of a federal rulemaking, the opportunities for cooperative resource management by federal and state authorities, and the absence of a conflict between the court of appeals and the Alaska Supreme Court, there are compelling grounds to deny review in the hope that the parties will reach an accommodation through the administrative or political processes. If those efforts are unavailing, then the litigation will continue and the parties will have another opportunity to petition this Court for review. At that point, moreover, the issues would be presented to this Court in a more concrete context.

## CONCLUSION

The petition and cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

# Supreme Court of the United States

October Term, 1995

STATE OF ALASKA,

*Petitioner,*

v.

BRUCE BABBITT, SECRETARY
OF THE INTERIOR, et al.,

*Respondents.*

**Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Ninth Circuit**

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The State petitioned for certiorari because the conflicting decisions of the Alaska Supreme Court in *Totemoff v. State*, 905 P.2d 954 (Alaska 1995) and the Ninth Circuit will cause serious jurisdictional problems, and because the Ninth Circuit's interpretation of "public lands" usurps the State's right to manage fisheries in Alaska without clear indication that Congress intended this result. The respondents insist that no conflict exists. The United States maintains also that nothing has been finally decided by the courts below. In so arguing, the respondents have mischaracterized both the *Totemoff* case and the Ninth Circuit decision.

## I. *TOTEMOFF* DIRECTLY CONFLICTS WITH THE NINTH CIRCUIT DECISION, AND THE ALASKA COURT OF APPEALS HAS ALREADY FOLLOWED THE ALASKA SUPREME COURT'S CONTRARY INTERPRETATION IN AFFIRMING THE CRIMINAL CONVICTION OF A RURAL RESIDENT.

The private respondents argue that fish and wildlife management will be harmonious in Alaska because *Totemoff* does not direct the State to do anything, and therefore the State is not bound to follow it. Private Opp. 24. That *Totemoff* itself does not direct the State to do anything is irrelevant; it constitutes law that Alaska State Courts must follow, holding that ANILCA's title VIII priority does not apply to navigable waters. The Alaska Court of Appeals, which hears state criminal appeals, already has issued a decision refusing to consider a rural Alaskan's argument that federal law applies to the stream where he was fishing when cited for state law violations. *Miyasato v. State of Alaska*, No. A-5486 (March 13, 1996).

The court declined to consider whether the stream might be "public lands," citing *Totemoff* and noting that the Alaska Supreme Court rejected the ruling of *State v. Babbitt*, 72 F.3d 698 (9th Cir. 1995). App. 3-4, 4 n.3. After the subsistence regulations become final, the *Totemoff* precedent presumably will compel state courts to conclude that the federal regulations are unauthorized and therefore invalid to the extent they purport to apply to waters subject to a federal reserved water right.

All respondents maintain that *Totemoff* did not present the issue of whether navigable waters constitute "public lands." To the contrary, the issue was squarely before the court. Mr. Totemoff raised his right to a subsistence priority under ANILCA as a defense to the State's prosecution for spotlighting deer from navigable waters. ANILCA's subsistence priority applies only to "public lands," 16 U.S.C. § 3114, so the court properly considered the issue of whether the navigable waters from which he shot the deer constitute "public lands."

This is not dictum because it is an alternative ground for the court's decision. The court determined both that ANILCA's subsistence priority does not include the right to spotlight deer and, alternatively, that even if it did, state law applies because the navigable waters of Prince William Sound do not constitute "public lands." 905 P.2d at 964. Where a decision rests on two or more grounds, none can be relegated to the category of "obiter dictum." *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949); *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 340 (1928); *United States v. Title Insurance & Trust Co.*, 265 U.S. 472, 486 (1924); *see also MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 346 n.4 (1986) (Where lower

court rested its holding on alternative bases of decision, one base was not dictum). The Alaska Supreme Court could just as well have decided only the issue of whether the navigable waters constitute "public lands" and not reached the issue of whether ANILCA's subsistence priority protected the defendant's spotlighting activity on public lands.

The private respondents argue that if the State's predictions of jurisdictional problems had merit, enforcement of hunting and fishing laws would already be chaotic, because the State and the federal government have shared management on fast lands since 1990. Private Opp. 25-27. Their reassurances are misplaced. The State is not concerned here with jurisdictional problems related to federal management on federal lands and state management on state and private lands. The jurisdictional division between the Federal Subsistence Board and the State heretofore has been defined by distinct geographic boundaries that prevent the conflicts the State describes in its petition. With the ruling below, however, jurisdictional problems will arise because the Alaska Supreme Court and the Ninth Circuit have issued irreconcilable decisions as to which government has exclusive authority to regulate subsistence fishing on many navigable waters in Alaska. The federal regulations may purport to apply to waters with reserved in-stream flows, but the state courts will follow *Totemoff's* holding that these waters are not subject to the Federal Subsistence Board's authority.

## II. THE NINTH CIRCUIT HAS ESTABLISHED AS CONTROLLING LAW THAT THE FEDERAL SUBSISTENCE BOARD MUST REGULATE FISHING IN ALL NAVIGABLE WATERS IN ALASKA SUBJECT TO A FEDERAL RESERVED WATER RIGHT, AND NO FURTHER COURT OR REGULATORY PROCEEDINGS WILL CHANGE THIS.

The United States argues that the Ninth Circuit decision "does not finally resolve the geographic scope of ANILCA's provisions" and "has not definitively resolved any legal rights." U.S. Opp. 13-15. These arguments might have some impact if the federal respondents' formulation of the "Question Presented" accurately described the ruling below. If the Ninth Circuit had merely ruled that the ANILCA subsistence priority "[applies] to fishing on some, but not all, navigable waters in Alaska," then the decision would have left the magnitude of the preemption quite uncertain. The court below went well beyond the United States' characterization, however. The Ninth Circuit held that federal agencies must identify the navigable waters of Alaska "in which the United States has an interest by virtue of the reserved water rights doctrine" and must assume fisheries management on these waters. 72 F.3d at 703-704.

This decision has far-reaching implications regardless of the outcome of further proceedings in this case. The Departments of Interior and Agriculture are not waiting for a final decision in this case to direct the Federal Subsistence Board to assume management of fishing for subsistence purposes in waters on about half of Alaska. While the regulations are not final, the United States has published its intent to take over management of fishing

within the boundaries of all National Parks, all National Preserves, all National Wildlife Refuges, all Wild and Scenic River Systems, the National Petroleum Reserve, Conservation and Recreation Areas, and the Chugach and Tongass National Forests. 61 Fed. Reg. 15,014 (April 4, 1996). This constitutes between 170-180 million acres of land, about half the size of Alaska (an area roughly equivalent to the states of Arizona and California combined). *See* Map of proposed areas of federal fisheries regulation, App. 6. Further, the regulations as proposed will grant the Federal Subsistence Board authority to restrict or eliminate fishing in waters beyond these areas, including commercial fishing in the territorial sea. 61 Fed. Reg. at 15,018.

From Alaska's perspective, much will be lost by the delay the United States advocates. The State will lose its traditional authority to manage its fisheries, one of the primary reasons Alaskans sought statehood, including some of its authority to regulate its second largest industry. Pet. 13-15. Alaskans will be subject to the confusion of separate sets of regulations and conflicting judicial interpretations of their applicability. From the United States' perspective, on the other hand, all that will be gained is delay. The United States has identified no unresolved claims or defenses in this case that could affect the Ninth Circuit's holding that "public lands" in ANILCA include all navigable waters in Alaska subject to reserved water rights, and none exist.

For this reason, the United States' second reason for opposing review, that rulemaking is underway in which the State may participate, is misleading. While the State may participate in the rulemaking designed to carry out

the Ninth Circuit's directive to identify navigable waters in which the United States has reserved water rights, 72 F.3d at 704, the Ninth Circuit already has decided the legal question that controls the rulemaking, and State participation cannot change this.[1]

## III. THE CONTROLLING LAW ESTABLISHED BY THE NINTH CIRCUIT IS MANIFESTLY CONTRIVED, AND IT IS INCONCEIVABLE THAT CONGRESS INTENDED TO EMPLOY THE RESERVED WATERS DOCTRINE TO DELINEATE PUBLIC LAND BOUNDARIES IN ANILCA.

The private respondents maintain that the State is incorrect in arguing that federal reserved water rights do not identify a definite geographic area and that the rights must be quantified. Private Opp. 18-19. They assert that the mere existence of any federal interest in the waters will qualify them as "public lands." *Id.* This is not what 16 U.S.C. § 3102 says, however, and the difference between the clear meaning of this section and the Ninth

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[1] Eleven amici states disagree that the decision has no significance outside Alaska. U.S. Opp. 14-15. Despite the Ninth Circuit's assurance that its precedent does not authorize federal "usurpation" in other states, the amici point out that the court interpreted boilerplate language that appears throughout title 16 of the United States Code. Further, the amici take issue with the court's explanation that its interpretation of "public lands" is necessary to give meaning to ANILCA's purpose, pointing out that ANILCA is not the sole federal statute with a broad purpose.

Circuit's effective revision of it demonstrates the contrived nature of the decision below. Rather than examining the definition of "public lands" to determine whether Congress clearly intended to include waters subject to a federal reserved water right, the Ninth Circuit decided that ANILCA's purposes would be served by including some navigable waters, then effectively rewrote 16 U.S.C. § 3102 to accommodate this position. The court redrafted Congress' definition of "public lands" from "lands, waters, and interests therein, title to which is in the United States," to "lands and waters in which the United States has any interest." Under the definition as Congress wrote it, only the federal interest in lands and waters is "public lands," *e.g.*, only the reserved water right itself; the existence of a federal interest cannot be interpreted to convert tracts of land or entire waterways to "public lands." Congress did not draft 16 U.S.C. § 3102 to apply title VIII everywhere the slightest federal interest can be found, but the Ninth Circuit interpretation will include many non-federal lands in Alaska, as well as every waterway with federal access rights or nonreserved water rights. The manufactured nature of this interpretation defies any possibility that Congress intended its definition of "public lands" to be so construed, and thus defies the clear statement requirement.[2]

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[2] The private respondents maintain also that this Court already has decided the issue in this case in *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987). Private Opp. 17. The State has responded to this claim in its Opposition to the Cross-Petition of the Alaska Federation of Natives, at 11-13.

Clearly the Ninth Circuit wrongly decided this case. This Court should review the decision below because of its direct conflict with *Totemoff;* because public lands never have been defined by reserved water rights, and ANILCA and its legislative history give no indication that Congress meant the boilerplate language invoked by the court of appeals to have this effect; and because federal preemption of management of the valuable fishery resources of Alaska, announced by the Ninth Circuit with no acknowledgment of the clear statement rule, is an issue of grave public importance to Alaska.

## CONCLUSION

For the reasons stated above and in the petition, this Court should grant the State of Alaska's petition.

Respectfully submitted,

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THE COURT OF APPEALS OF THE STATE OF ALASKA

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| CHESTER J. MIYASATO, Appellant, v. STATE OF ALASKA, Appellee. | Court of Appeals No. A-5486<br>Trial Court No. 1SI-S93-237CR<br>MEMORANDUM OPINION AND JUDGMENT*<br>[No. 3359 – March 13, 1996] |

Appeal from the District Court, First Judicial District, Sitka, Larry C. Zervos, Judge.

Appearances: Galen S. Paine, Assistant Public Defender, Sitka, and John B. Salemi, Public Defender, Anchorage, for Appellant. Joanne M. Grace, Assistant Attorney General, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Appellee.

Before: Bryner, Chief Judge, and Coats and Mannheimer, Judges.

COATS, Judge.

The district court, sitting without a jury, convicted Chester J. Miyasato of fishing in waters closed under former 5 Alaska Administrative Code (AAC) 46.050(b) and (c)(5)(B). Specifically, Miyasato was charged and convicted of catching salmon over 16 inches in length in an area closed to fishing for salmon over 16 inches in

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* Entered pursuant to Appellate Rule 214 and Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3).

length.[1] Miyasato appeals, contending the state had no jurisdiction to prosecute him. Miyasato also argues that the state should have seized and preserved the salmon he caught. We affirm.

On August 25, 1993, State Fish and Wildlife Protection Officer Gary Hunt saw Miyasato, who was accompanied by two small children, fishing with a rod and reel in Starrigavan Creek; Hunt watched Miyasato catch a couple of fish and put them in his car. Hunt then stopped Miyasato in his car as Miyasato was leaving the creek area, and Miyasato admitted that he had caught three salmon. Hunt could see three cleaned fish, which Hunt recognized as salmon, in a basket in the back of Miyasato's car; Hunt estimated that the fish were between 18 and 21 inches long, well above the 16-inch limit. Hunt testified that the fish were longer than the basket they were in and the box holding the basket, which appeared to be a standard-type beverage case; Hunt later measured

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[1] Former 5 AAC 46.050(c)(5)(B) provided: "In fresh water . . . Starrigavan Creek is closed to salmon fishing." However, former 5 AAC 46.050(b) provided: "Fresh waters closed to salmon fishing but open to trout, grayling, char or kokanee fishing are also open to the taking of salmon less than 16 inches in length." Former 5 AAC 46.020(a) provided general bag limits for various kinds of fish, including kokanee, trout, and grayling. Former 5 AAC 46.020(b)(15) set out, as an exception to the bag limits in subsection (a), that "near Sitka, in . . . Starrigavin [sic] Creek, . . . rainbow trout and steelhead trout may not be possessed or retained from April 1 through June 30." Therefore, on August 25, 1993, in Starrigavan Creek, the date and location of the offense in this case, fishing for salmon less than 16 inches long was legal although the creek was otherwise closed to salmon fishing. (Chapter 46 of 5 AAC was repealed on April 15, 1994.)

a similar box and found it to be about 16.25 inches long by 10.5 inches wide. Hunt did not take possession of the fish, but let Miyasato keep them for food. Miyasato also admitted on that day that he did not have a personal use fishing permit. At trial, Miyasato testified that he had been subsistence fishing for salmon and had caught five humpy salmon; Miyasato testified that he did not know the length of the fish but added that "I would say that the officer gave a pretty good estimate of the length of the fish" and that the fish could have been over 16 inches long. After hearing the evidence, Acting District Court Judge Larry C. Zervos found that Miyasato had caught salmon over 16 inches long from Starrigavan Creek and had therefore violated the state regulations.

Miyasato first contends that the district court should have granted his motion to dismiss for lack of state jurisdiction over his offense. Specifically, Miyasato contends that the state did not have jurisdiction over fishing in Starrigavan Creek because the creek, or at least the tidal area of the creek, is "public land" subject to control by the federal government under the Alaska National Interest Lands Conservation Act (ANILCA).[2] Miyasato argues that the offense occurred on navigable waters and that ANILCA extends its grant of federal control of hunting and fishing to navigable waters. However, the Alaska Supreme Court has specifically held that navigable waters are generally not "public land" under ANILCA

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[2] 16 U.S.C. §§ 3101-3233.

and that the federal government does not have jurisdiction over them. *Totemoff v. State*, 905 P.2d 954, 962-68 (Alaska 1995).[3]

Miyasato also contends that Judge Zervos should have suppressed the evidence of the salmon or dismissed the case because the state did not seize and preserve the salmon. Before trial, Miyasato moved to compel discovery of the salmon from the state or, in the alternative, to suppress the evidence of the salmon. Judge Zervos denied the motion, noting that Miyasato had had possession and control of the fish and had been the one to destroy them.

The state's duty to preserve evidence extends only to evidence that the state has actually collected and taken into its possession. *Snyder v. State*, 879 P.2d 1025, 1028 (Alaska App. 1994); *March v. State*, 859 P.2d 714, 716 (Alaska App. 1993). Hunt never gathered or possessed the salmon that he saw in the back of Miyasato's car. Instead he cited Miyasato for the offense and let Miyasato keep the fish. Miyasato's retention of the fish allowed him a reasonable opportunity to preserve or measure the fish if he disputed Hunt's observations. Moreover, as

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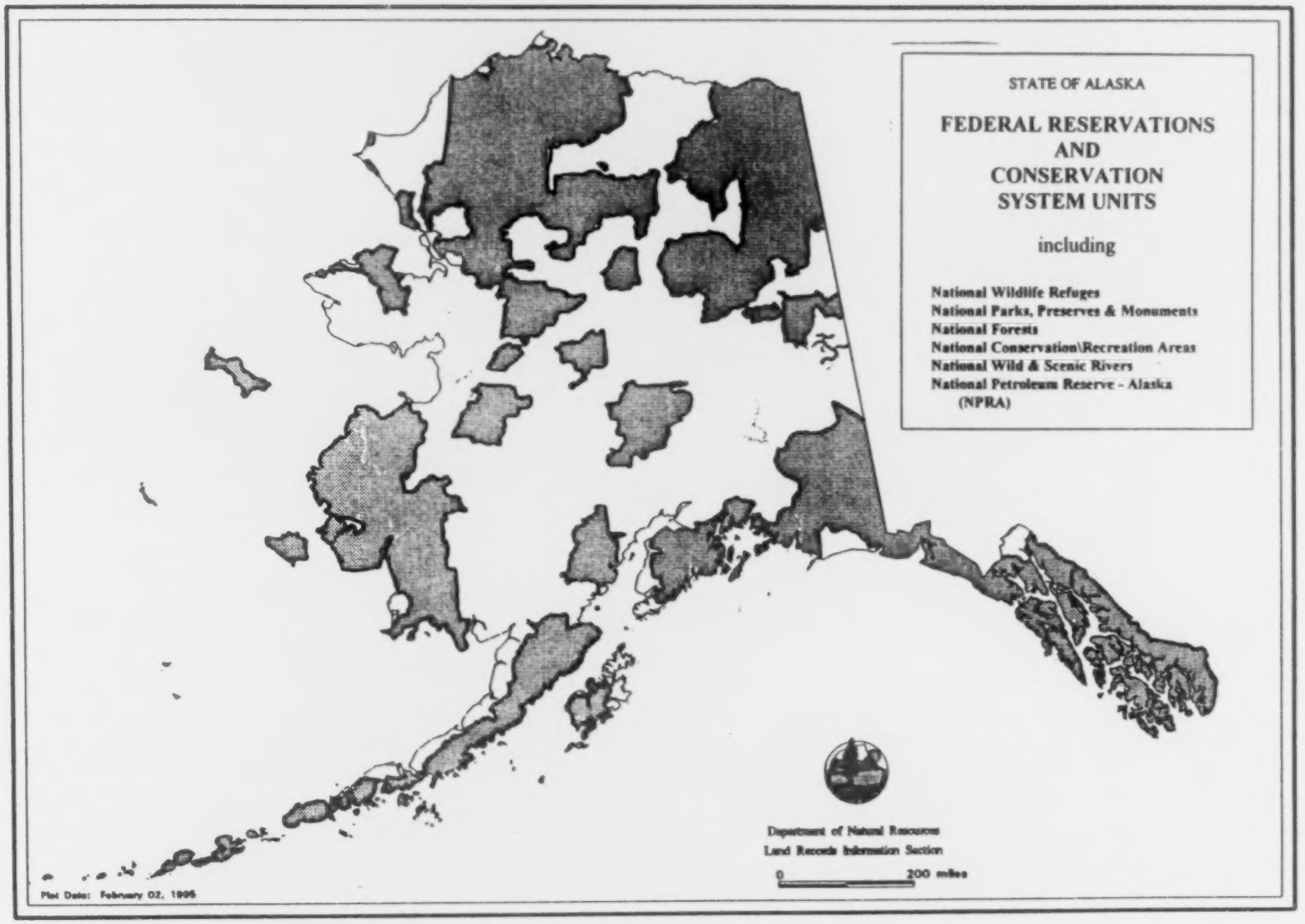
[3] Miyasato argues that we should follow the contrary decision of the Ninth Circuit in the *"Katie John"* case, *Alaska v. Babbitt*, 54 F.3d 549 (9th Cir. 1995), withdrawn and superseded by *Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995). However, the Alaska Supreme Court specifically rejected the ruling of *Katie John* on this point, noting that it was not bound by rulings of federal courts, other than the United States Supreme Court, on questions of federal law. 905 P.2d at 963. This court, in turn, is bound by the ruling of the Alaska Supreme Court on this issue. *Harrison v. State*, 791 P.2d 359, 363 (Alaska App. 1990).

Judge Zervos noted, the state's failure to seize and measure the fish deprived it of the potentially most conclusive incriminating evidence against Miyasato. At trial, the state presented only Hunt's testimony regarding his observations, rather than any measurements or test results. Miyasato took full advantage of the opportunity to challenge the credibility and accuracy of Hunt's observation through cross-examination and through his own testimony. To the extent that the fish themselves would have aided Miyasato's effort, Miyasato bears the responsibility for the absence of evidence. *Cf. Prenesti v. State*, 594 P.2d 63, 65 (Alaska 1979). Miyasato himself testified that Hunt had given "a pretty good estimate of the length of the fish." We find no error.

We AFFIRM the conviction.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